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Volume 7 | Issue 1

Note

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7-1-2018

## Agribusiness and Antitrust: The Bayer-Monsanto Merger, Its Legality, and Its Effect on the United States and European Union

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### Recommended Citation

Aleah Douglas, *Agribusiness and Antitrust: The Bayer-Monsanto Merger, Its Legality, and Its Effect on the United States and European Union*, 7 *Global Bus. L. Rev.* 156 (2018)  
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**AGRIBUSINESS AND ANTITRUST: THE BAYER-MONSANTO MERGER, ITS LEGALITY, AND ITS EFFECT ON THE UNITED STATES AND EUROPEAN UNION**

ALEAH DOUGLAS

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ABSTRACT

This note examines the current and historical antitrust laws of the United States and the European Union as they relate to the currently pending merger between Bayer and Monsanto. It focuses alternatively on the legality of the merger under modern antitrust laws and the impact such a deal could have on the agribusiness industry in both Europe and the United States. Ultimately, the note argues that the Bayer-Monsanto merger is illegal and should be blocked by the proper authorities in the United States and the European Union.

## I. INTRODUCTION

“They were a gigantic combination of capital, which had crushed all opposition, and overthrown the laws of the land, and was preying upon the people.” Upton Sinclair, *The Jungle*.<sup>1</sup>

The United States and the European Union have well-established antitrust laws that strictly scrutinize mergers and acquisitions between large companies that can dominate the market and impede fair competition.<sup>2</sup> The Federal Trade Commission and Department of Justice Antitrust Division in the U.S. and the European Commission in the EU enforce these regulations, and violators can be subject to strict penalties.<sup>3</sup>

In 2016, Bayer proposed to purchase Monsanto in a merger worth \$66 billion.<sup>4</sup> As of 2017, the merger is still pending and will need to be approved in thirty jurisdictions worldwide, such as Canada, Brazil, the United States, and the European Union.<sup>5</sup> Bayer, known primarily as a pharmaceutical giant in the United States, is a major producer of agricultural chemicals and pesticides.<sup>6</sup> Monsanto, in addition to producing Roundup (a weed-killer),<sup>7</sup> is a major manufacturer of genetically-modified seeds in the United States.<sup>8</sup> A merger between these companies, which operate in the same industry, is arguably illegal in both the United States and the European Union under current antitrust laws. Allowing the Bayer-Monsanto merger to proceed would be detrimental to both American and European farmers, as prices are likely to increase while available selections will decrease,<sup>9</sup> and innovation is threatened.<sup>10</sup> The Federal Trade Commission, United States Department of Justice Antitrust Division, and the European Commission should block the merger from progressing.

This note will analyze the pending merger with the following format: the first part will discuss the background details surrounding the Bayer-Monsanto merger of 2016. It will note

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<sup>1</sup> Upton Sinclair, *THE JUNGLE* 376 (Upton Sinclair, 1920).

<sup>2</sup> See FTC, *GUIDE TO ANTITRUST LAWS*, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Jan. 29, 2017); see also EUR. COMM’N, *ANTITRUST: OVERVIEW*, [http://ec.europa.eu/competition/antitrust/overview\\_en.html](http://ec.europa.eu/competition/antitrust/overview_en.html) (last visited Oct 22, 2016).

<sup>3</sup> *Id.*

<sup>4</sup> *Bayer-Monsanto Deal Likely to Face Intense Regulatory, Political Scrutiny*, SANTA BARBARA POST, Sept. 15, 2016, <http://www.santabarbarapost.com/index.php/sid/247666387>.

<sup>5</sup> *Id.*

<sup>6</sup> Drew Harwell, *Bayer and Monsanto to Merge in Mega-Deal That Could Reshape World’s Food Supply*, WASH. POST, Sept. 14, 2016, [https://www.washingtonpost.com/news/business/wp/2016/09/14/bayer-and-monsanto-merge-in-mega-deal-aimed-at-domi-worlds-food-supply/?utm\\_term=.74f19298ed42](https://www.washingtonpost.com/news/business/wp/2016/09/14/bayer-and-monsanto-merge-in-mega-deal-aimed-at-domi-worlds-food-supply/?utm_term=.74f19298ed42).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Associated Press, *Here’s How a Bayer-Monsanto Merger Affects Workers, Farmers, and Investors*, FORTUNE.COM (May 24, 2016), <http://fortune.com/2016/05/24/bayer-monsanto-merger/>.

<sup>10</sup> Christopher Alessi & Jacob Bunge, *Bayer, Monsanto Shareholders Not All Cheering Over \$57 Billion Deal*, WALL ST. J., Sept. 15, 2016, <http://www.wsj.com/articles/bayer-shareholders-mostly-upbeat-about-monsanto-deal-1473944548>.

briefly both the monetary aspects of the deal and the political backlash that has already occurred and that is likely to continue should the merger be approved.

The second and third parts will focus on the laws that exist pertaining to the merger in both the United States and the European Union. It will first focus on the laws existing in the United States and include an explanation of the relevant laws: the Sherman Antitrust Act, the Clayton Act, the Federal Trade Commission Act, and the Hart-Scott-Rodino Antitrust Improvement Act. It will also review the prominent antitrust case *Sherman Oil Co. v. United States*.<sup>11</sup> The section will examine potential problems and antitrust violations caused by the merger. It will conclude with a discussion of American agribusiness and the reactions of farmers including a discussion of the antitrust laws in the U.S., potential antitrust violations and problems the merger will face, and the potential impact of the merger on American agribusiness.

In the third part, the note will begin with a brief discussion of the countries that comprise the European Union. It will then focus on the laws that pertain to the merger in the European Union, including a discussion of the antitrust laws in the EU, set out primarily in the Treaty for the Functioning of the European Union.<sup>12</sup> It will discuss potential antitrust violations and problems the merger will face, and the potential impact of the merger on European agribusiness. This section will also discuss the heavy anti-GMO sentiment in Europe and how that may have political ramifications in regards to the merger.

Finally, an argument will be made that the Bayer-Monsanto merger is a violation of United States and European Union antitrust laws. This section will consider available information regarding the possible benefits and detriments consumers (primarily those working in farming) in both locations may face as well as the impact the deal will have on other pending agribusiness mergers. The note will conclude that the Federal Trade Commission and European Union should block the proposed Bayer Monsanto Merger.

## II. BACKGROUND

### A. *A Review of the Bayer-Monsanto Merger*

Across the globe, farmers are experiencing a profit drought as crop prices decline and seed prices increase, a reflection of the industry's "wrenching downturn."<sup>13</sup> The market saturation of crops has forced farmers to drop their prices and reduce spending on materials—including seeds, pesticides, and fertilizer—negatively impacting sales on major agribusiness companies worldwide.<sup>14</sup> As a result, major agribusiness corporations are combing their assets and minimizing their costs; "four major agribusiness mergers have been announced in the last year."<sup>15</sup> Most

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<sup>11</sup> *Standard Oil Co. v. United States*, 31 S. Ct. 502 (1911).

<sup>12</sup> EUR. COMM'N, *supra* note 2.

<sup>13</sup> Leslie Picker et al., *Bayer Deal for Monsanto Follows Agribusiness Trend, Raising Worries for Farmers*, N.Y. TIMES, Sept. 14, 2016, [http://www.nytimes.com/2016/09/15/business/dealbook/monsanto-bayer-deal.html?\\_r=2](http://www.nytimes.com/2016/09/15/business/dealbook/monsanto-bayer-deal.html?_r=2).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

prominent among these deals is the recently proposed merger between Bayer and Monsanto; at approximately \$66 billion, it could be the “the largest acquisition of 2016.”<sup>16</sup>

As may be expected from a merger of this magnitude, antitrust concerns have been raised worldwide.<sup>17</sup> There is a particular concern in the United States, where recent agribusiness consolidations “would place more than 80% of U.S. corn-seed sales and 70% of the global pesticide market under just three companies.”<sup>18</sup> In addition to the Bayer Monsanto merger, there are pending mergers between Dupont and Dow, as well as between Syngenta and ChemChina.<sup>19</sup> The European Union faces a similar problem with its corn-seed and pesticide markets, and will be closely analyzing the deal while considering the overall changing landscape in agribusiness.<sup>20</sup>

In the United States, it may not initially seem to be a major antitrust concern, as Bayer is primarily known for its pharmaceutical business.<sup>21</sup> However, another branch of the company focuses on “agriculture chemicals, crop supplies and compounds that kill bugs and weeds.”<sup>22</sup> The chemical business is the second largest in the world.<sup>23</sup> Monsanto, of course, is a major United States manufacturer of seeds (specifically, genetically modified seeds).<sup>24</sup> Monsanto additionally manufactures the weed-killer Roundup.<sup>25</sup> The merger would result in a company that has a major interest in both the seeds that are sold to farmers and the pesticides used to protect the crops that grow from those seeds.<sup>26</sup> The merger could potentially dominate the farming industry.<sup>27</sup>

This merger will likely face political backlash. Already, United States Senators such as Mike Lee and Bernie Sanders, have expressed concerns regarding the merger.<sup>28</sup> Sanders commented, “The attempted takeover of Monsanto by Bayer is a threat to all Americans. These mergers boost the profits of huge corporations and leave Americans paying even higher prices. Not only should this merger be blocked, but the Department of Justice should reopen its

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<sup>16</sup> *Id.*

<sup>17</sup> *Bayer’s Deal for Monsanto*, WALL ST. J. AT A GLANCE (Sept. 14, 2016, 3:44 PM), <http://blogs.wsj.com/briefly/2016/09/14/bayers-deal-for-monsanto-at-a-glance/>.

<sup>18</sup> *Id.*

<sup>19</sup> Colin Todhunter, *Bayer-Monsanto Deal Hints at Dark Future Of Corporate Monopolies*, HUFFINGTON POST CAN. (Sept. 16, 2016, 10:47 AM), [http://www.huffingtonpost.ca/colin-todhunter/bayer-monsanto-monopoly\\_b\\_12025918.html](http://www.huffingtonpost.ca/colin-todhunter/bayer-monsanto-monopoly_b_12025918.html).

<sup>20</sup> Picker et al., *supra* note 13.

<sup>21</sup> Harwell, *supra* note 6.

<sup>22</sup> *Id.*

<sup>23</sup> Todhunter, *supra* note 19.

<sup>24</sup> Picker et al., *supra* note 13.

<sup>25</sup> Harwell, *supra* note 6.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> Picker et al., *supra* note 13.

investigation of Monsanto's monopoly over the seed and chemical market."<sup>29</sup> Constituents, fearing rising input costs to their farms, have reached out to their elected officials.<sup>30</sup>

Historically, the completion of the merger is much more likely under a conservative administration, yet not all Republicans are backing the deal.<sup>31</sup> Republican Senator Mike Lee expressed the following sentiment:

The transaction has the potential to result in a significant loss of competition and reduced incentives and ability to innovate, thereby raising prices and reducing consumer choice. I will encourage the DOJ or FTC to closely scrutinize the transaction and will consider whether a hearing is necessary to fully explore the competition issues raised by so much consolidation in such a short time.<sup>32</sup>

Lee has been outspoken about antitrust law in general, reminding the country that "antitrust law is and should be a nonpartisan issue. It should be an issue that is neither liberal nor conservative."<sup>33</sup>

Bayer's offer to buy Monsanto raises additional concerns in the European Union, where genetically modified organisms (GMOs) face skepticism and strict regulation.<sup>34</sup> In Germany (Bayer's home country), the deal is likely to create a "mega public relations challenge,"<sup>35</sup> as some "view Monsanto as the main example of American corporate evil."<sup>36</sup> An alliance with Monsanto could tarnish Bayer's reputation.<sup>37</sup> Bayer appears to be anticipating the damage, as it has retained the services of two large public relations firms to provide guidance on the merger.<sup>38</sup>

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<sup>29</sup> David Francis, *Is the Bayer-Monsanto Merger Too Big to Succeed?*, DENVER POST, Sept. 18, 2016, <http://www.denverpost.com/2016/09/18/bayer-monsanto-merger/>.

<sup>30</sup> Associated Press, *supra* note 9.

<sup>31</sup> Brian Schwartz, *Bayer-Monsanto's \$66B Deal Roils Regulators and Now Politicians*, FOX BUS. (Sept. 15, 2016), <http://www.foxbusiness.com/politics/2016/09/15/bayer-monsantos-66b-deal-roils-regulators-and-now-politicians.html>.

<sup>32</sup> *Id.*

<sup>33</sup> Diane Bartz, *Conservative U.S. Senator Won't Fault Obama on Antitrust Law*, REUTERS, Sept. 9, 2015, available at <http://www.reuters.com/article/usa-congress-antitrust-idUSL1N11F2T820150909>.

<sup>34</sup> *Restrictions on Genetically Modified Organisms: European Union*, LIBR. OF CONG. (June 9, 2015), <http://www.loc.gov/law/help/restrictions-on-gmos/eu.php>.

<sup>35</sup> Stefan Nicola & Birgit Jennen, *Bayer's Mega Monsanto Deal Faces Mega Backlash in Germany*, BLOOMBERG (May 19, 2016 8:42 AM), <https://www.bloomberg.com/news/articles/2016-05-19/bayer-s-mega-deal-for-monsanto-faces-mega-pr-backlash-in-germany>.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

As Bayer prepares to seek approval in over 30 jurisdictions worldwide,<sup>39</sup> it will need to consider various antitrust laws. Both the United States and the European Union have well-defined antitrust laws regulators will consider when determining the legality of the merger.

*B. United States Antitrust Laws*

i. The Applicable Laws

The United States has a relatively long history of antitrust laws that are primarily governed by four acts: 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.<sup>40</sup> The Sherman Antitrust Act is the oldest antitrust law in America, yet it is in many ways still valid law.<sup>41</sup> This Act prohibits “every contract, combination, or conspiracy in restraint of trade,”<sup>42</sup> as well as any “monopolization, attempted monopolization, or conspiracy or combination to monopolize.”<sup>43</sup> It is important to remember that the Sherman Act does not prevent every act that restricts trade; reasonable partnerships and mergers are permissible.<sup>44</sup> Unreasonable restrictions of trade found to be in violation of this Act “may be prosecuted as criminal or civil offenses.”<sup>45</sup> The Federal Trade Commission (FTC) advises that in general, these violations are criminally prosecuted when

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<sup>39</sup> *Bayer-Monsanto Deal*, *supra* note 4.

<sup>40</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>41</sup> *Id.*

<sup>42</sup> Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7; *see also Restrictions on Genetically Modified Organisms*, *supra* note 34.

<sup>43</sup> *Id.* More specifically:

Section 1. Trusts, etc., in restraint of trade illegal; penalty: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. Section 2. Monopolizing trade a felony; penalty: Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. *Id.*

<sup>44</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>45</sup> U.S. DEP'T OF JUST., ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (Apr. 1995), <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>.

“competitors fix prices or rig bids.”<sup>46</sup> Still, a merger resulting in an unfair share of the market can result in fines of up to \$10 million for a corporate defendant.<sup>47</sup>

As with many broad statutes, the Sherman Antitrust Act was limited by relevant case law: specifically, *Standard Oil Co. v. United States*.<sup>48</sup> Here, the United States filed suit against the Standard Oil Co. and 37 other defendants for conspiring to restrain the trade and commerce in petroleum and to monopolize the petroleum industry.<sup>49</sup> Although the Supreme Court held that the Sherman Oil Company did violate the Sherman Antitrust Act, it established a standard of review that would limit the transactions considered illegal under the Act.<sup>50</sup> When considering a case where the actions of those involved restrict trade, “the rule of reason becomes the guide.”<sup>51</sup> Transactions are tested on whether the restrictions to trade they created were reasonable. In this case, the actions of the corporate defendants were deemed an unreasonable restriction to trade.<sup>52</sup>

Not long after the Sherman Antitrust Act of 1890 was passed, the Federal Trade Commission Act of 1914 came into effect. The Federal Trade Commission Act created the Federal Trade Commission, a governing body in U.S. antitrust law.<sup>53</sup> The Act also expressly prohibited

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<sup>46</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>47</sup> *Id.*

<sup>48</sup> *Standard Oil*, 31 S. Ct. at 504.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 516.

<sup>51</sup> *Id.* at 518.

<sup>52</sup> *Id.* at 524.

<sup>53</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.



“unfair methods of competition.”<sup>54</sup> Per the United States Supreme Court, Sherman Antitrust violations are, by default, violations of the Federal Trade Commission Act.<sup>55</sup>

Expanding on the laws already in place, the Clayton Antitrust Act of 1914 provides a clearer view of the federal government’s stance on large acquisitions.<sup>56</sup> Specifically, the Act states that

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<sup>54</sup> Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41-58. The unfair methods of competition are detailed more thoroughly in §45:

Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C. 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C. 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims. *Id.*

<sup>55</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>56</sup> *Id.*

no person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.<sup>57</sup>

More plainly, this act forbids one business from buying all or part of another business that would significantly incapacitate the industry.<sup>58</sup>

In 1976, the Clayton Act was amended.<sup>59</sup> The amendment, known as the Hart-Scott-Rodino Antitrust Improvements Act, is particularly important because it details the procedures that must be followed at the federal level for one corporation to legally acquire another.<sup>60</sup> Specifically, large organizations must submit premerger filings with the federal government so that they may be scrutinized and approved.<sup>61</sup>

The laws above are enforced by two agencies: the Federal Trade Commission and the United States Department of Justice.<sup>62</sup> The agencies are complementary.<sup>63</sup> The Federal Trade Commission, established in 1914, “may ‘gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions.’”<sup>64</sup> Its investigative powers are rather broad. The agency may also enforce the federal antitrust laws.<sup>65</sup> Violations of a Federal Trade Commission order may result in injunctions or civil penalties.<sup>66</sup>

Specifically in antitrust law, the Federal Trade Commission has adjudication and rulemaking administrative enforcement powers, in addition to judicial enforcement powers.<sup>67</sup>

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<sup>57</sup> Clayton Antitrust Act of 1914, 15 U.S.C. §§ 12-27.

<sup>58</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*; *see* Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

<sup>61</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>62</sup> FTC, THE ENFORCERS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers> (last visited Jan. 29, 2017).

<sup>63</sup> *Id.*

<sup>64</sup> FTC, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION’S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY (2008), <https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority>.

<sup>65</sup> FTC, THE ENFORCERS, *supra* note 62.

<sup>66</sup> *Id.*

<sup>67</sup> FTC, BRIEF OVERVIEW OF FTC’S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY, *supra* note 64.

“Where a violation of the Clayton Act is alleged, the Commission proceeds under Section 11 of the Clayton Act (15 U.S.C. Sec. 21), which parallels Section 5(b) of the FTC Act in authorizing adjudicatory proceedings.”<sup>68</sup> The Federal Trade Commission has the authority to create rules under Section 18 of the Federal Trade Commission Act.<sup>69</sup> Judicially, “[t]he Commission may also obtain permanent injunctive relief against an antitrust violation in an appropriate case, as well as disgorgement of unjust enrichment, restitution for injury suffered by consumers (e.g., the refund of overcharges attributable to price-fixing) or other appropriate equitable remedies.”<sup>70</sup>

The Department of Justice’s Antitrust Division is guided by this mission statement: “The mission of the Antitrust Division is to promote economic competition through enforcing and providing guidance on antitrust laws and principles.”<sup>71</sup> It is the Division’s goal to enforce laws, provide guidance, and advocate for fair competition.<sup>72</sup> In cases of suspected federal antitrust violations, the Federal Trade Commission will consult with the Antitrust Division before launching an investigation.<sup>73</sup> This way, only one agency will investigate the alleged offenses.<sup>74</sup>

There are several key differences between the Federal Trade Commission and the Antitrust Division.<sup>75</sup> They include:

- The Department of Justice can pursue criminal sanctions, while the Federal Trade Commission is limited to civil sanctions.<sup>76</sup>
- The Department of Justice generally focuses on financial services, telecommunications, and agriculture, while the Federal Trade Commission generally focuses on defense, pharmaceutical, and retail industries.<sup>77</sup> This is particularly noteworthy considering that while the proposed Bayer Monsanto merger is agricultural in nature, Bayer remains a top pharmaceutical company worldwide.
- The Federal Trade Commission may file an administrative complaint before seeking civil sanctions, while the Department of Justice does not have an administrative option and must begin by filing a suit in federal court.<sup>78</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> U.S. DEP’T OF JUST., MISSION (July 20, 2015), <https://www.justice.gov/atr/mission>.

<sup>72</sup> *Id.*

<sup>73</sup> FTC, THE ENFORCERS, *supra* note 62.

<sup>74</sup> *Id.*

<sup>75</sup> Todd N. Hutchinson, *Understanding the Differences Between the DOJ and the FTC*, AM. BAR ASS’N, [http://www.americanbar.org/groups/young\\_lawyers/publications/the101201practice\\_series/understandingdifferences.html](http://www.americanbar.org/groups/young_lawyers/publications/the101201practice_series/understandingdifferences.html) (last visited Jan. 29, 2017).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

ii. Problems and Antitrust Violations

There are growing concerns that a merger between Bayer and Monsanto is illegal under the federal antitrust laws (particularly the Clayton Act).<sup>79</sup> The companies are two of the largest suppliers of seed and farm supplies, so opposing forces are concerned that competition in this area would be substantially decreased.<sup>80</sup> In the cotton industry alone, the two companies represent 70% of the market.<sup>81</sup> In addition to regulatory scrutiny, independent organizations have expressed an opposition to the merger.<sup>82</sup> SumOfUs, a self-described “international corporate watchdog,” has already begun an international petition to stop the merger.<sup>83</sup>

Since the mid-1990s, the seed industry has seen a dramatic decrease of companies and a dramatic increase of prices.<sup>84</sup> In a recent report issued by SumOfUs, “Maurice Stucke and Allen Grunes [formerly of the Department of Justice’s Antitrust Division] said that the merger would violate the Clayton Act, which was enacted to curb anticompetitive business practices, and would eliminate direct competition between Bayer and Monsanto, which are two of the largest players in the genetically engineered seed industry.”<sup>85</sup> The 21-page report outlines the following concerns:

The merger would:

- Increase concentration in already concentrated industries for genetic traits, seed, and herbicides. For example, Bayer-Monsanto post-merger would account for approximately 70 percent of the U.S. acreage for cotton, with similar or higher shares in different regions of the U.S.
- Increase Monsanto’s already significant market power and increase its dominance in herbicides and genetic traits for seed.
- Eliminate not only the direct competition between Bayer and Monsanto for traits, herbicide, and crop seed, but also the head-to-head competition in agricultural biotechnology innovation markets and reduce opportunities for pro-competitive research and development (R&D) collaborations.

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<sup>79</sup> *Antitrust Experts Warn against Proposed Bayer-Monsanto Merger*, SUMOFUS, <https://www.bayermonsantomerger.com/a/bayer-monsanto-press> (last visited Jan. 29, 2017).

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> John Kennedy, *Former DOJ Officials Warn against Bayer-Monsanto Merger*, LAW360 (Aug. 3, 2016, 9:40 PM), <https://www.law360.com/articles/824584/former-doj-officials-warn-against-bayer-monsanto-merger>.

<sup>85</sup> *Id.*

- Likely lead to higher input prices, less choice and higher food prices for consumers, including fewer non-biotechnology options available to farmers and consumers.<sup>86</sup>

There are additional concerns that a Bayer-Monsanto merger would directly violate a federal order regarding the latter company.<sup>87</sup> In 2007, Monsanto attempted to acquire Delta & Pine Land Co.<sup>88</sup> In response to the Department of Justice's concerns about antitrust violations, "Monsanto agreed to divest some cottonseed and cotton breeding assets to a buyer the DOJ believed would maintain competition."<sup>89</sup> Bayer purchased the assets, and "if the merger proceeds, Monsanto would reacquire them, violating the final judgment, which specifically forbids the company from buying back any of the divestitures prior to 2018."<sup>90</sup>

### iii. American Agribusiness

Agribusiness experts are concerned by what this merger could mean to farmers.<sup>91</sup> Because of their large controlling share of the market, the combined company could ultimately raise prices and limit available options of pesticides and seeds.<sup>92</sup> Higher prices are likely to influence the bipartisan political backlash noted above. What results is a chain reaction: The higher prices are for seeds and pesticides, the more the general public will pay for food.<sup>93</sup> Products in the soy industry have the potential to have significantly higher prices.<sup>94</sup> Additionally, some fear that with less competition comes less innovation, and the new mega company will focus more on profitability than pursuing "the sorts of innovations needed to improve crop yields and help feed a rapidly growing world."<sup>95</sup>

Most notable among those who oppose the merger is the National Farmers Union, which "represents family farmers, fishers and ranchers across the country, with formally organized

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<sup>86</sup> Maurice E. Stucke & Allen P. Grunes, *An Antitrust Review of a Bayer-Monsanto Merger*, THE KONKURRENZ GRP. (July 22, 2016), <http://www.konkurrenzgroup.com/Lists/Posts/Post.aspx?ID=111>.

<sup>87</sup> Kennedy, *supra* note 84.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Associated Press, *supra* note 9.

<sup>92</sup> *Id.*

<sup>93</sup> Brad Plumer, *Why Bayer's Massive Deal to Buy Monsanto Is So Worrisome*, VOX (Sept. 15, 2016, 3:04 PM), <http://www.vox.com/2016/9/14/12916344/monsanto-bayer-merger>

<sup>94</sup> Emma Court, *How a Bayer-Monsanto Merger Will Wind Up Costing You at the Grocery Store*, MARKETWATCH (Sept. 15, 2016, 6:59 AM), <http://www.marketwatch.com/story/bayer-monsanto-tie-up-not-good-news-for-anyone-who-eats-or-grows-food-2016-05-24>.

<sup>95</sup> Plumer, *supra* note 93.

divisions in 33 states.”<sup>96</sup> The organization represents 200,000 people.<sup>97</sup> In a September 2016 statement, National Farmers Union President Roger Johnson had this to say about the pending deal:

For the last several days our family farm and ranch members have been on Capitol Hill asking Members of Congress to conduct hearings to review the staggering amount of pending merger deals in agriculture today. We will continue to express concern that these megadeals are being made to benefit the corporate boardrooms at the expense of family farmers, ranchers, consumers and rural economies.<sup>98</sup>

Johnson goes on to call these megadeals an “alarming trend” in agribusiness that lead to “less competition, stifled innovation, higher prices and job loss in rural America.”<sup>99</sup> This attitude reflects the longstanding concerns of those within the agribusiness industry in regards to federal antitrust laws.<sup>100</sup>

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<sup>96</sup> *About NFU*, NAT’L FARMERS UNION, <https://nfu.org/about/> (last accessed Jan. 29, 2017).

<sup>97</sup> *Join NFU Today!*, NAT’L FARMERS UNION, <https://nfu.org/join/> (last accessed March 1, 2017).

<sup>98</sup> *NFU Condemns Bayer/Monsanto Deal, Asks for Critical Review of Consolidation in Ag*, NAT’L FARMERS UNION (Sept. 14, 2016), <https://nfu.org/2016/09/14/nfu-condemns-bayermonsanto-deal-asks-for-critical-review-of-consolidation-in-ag/>.

<sup>99</sup> *Id.*

<sup>100</sup> *See generally* John Lauck, *Toward an Agrarian Antitrust: A New Direction for Agricultural Law*, 75 N.D. L. REV. 449, 450 (1999). This article outlines the benefits of agrarian antitrust laws:

Part I of this article explains the inability of the antitrust laws to address the economic concentration issue that has historically concerned farmers and reviews strategies to reverse this failure by examining recent case law. Part II strengthens the case for an agrarian antitrust by appealing to the wider statutory regime built to protect the economic interests of farmers. Part III outlines a general theory of agrarian antitrust that avoids many of the problems reviewed in Part I and addresses the legislative priorities reviewed in Part II. Part III, after reviewing the absence of agrarian considerations in merger cases, also applies the theory to merger analysis, where it is of particular importance. *Id.*

*See also* Doug O’Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33, 34-35 (2004). This article focuses on the lack of choice caused by major agribusiness mergers:

The essential problem with consolidation and vertical integration, when taken too far, is that such trends reduce choice in the marketplace. Problems arise when one player has choices and the other player does not. This lack of choice can lead to unequal bargaining power in business relationships. With unequal bargaining power, the more dominant firm will almost always take advantage of the more vulnerable party by squeezing price, shifting liabilities, or demanding certain things without paying an associated price. Consolidation and vertical integration provide this type of setting. The question for policy makers is how to deal with the possibility of abusive practices stemming from consolidation and vertical integration. This outline presents different ways to affect the power imbalance in the food and agriculture sector. The first set of techniques go to the heart of the problem, attempting to equalize the bargaining power of the players by (1) affecting the structure of the industry and reducing the power of the stronger party, or by (2) encouraging collective bargaining and increasing the power of the weaker party. The second set of techniques is closely related to the first set, yet seem to accept the existence of a power imbalance. These techniques

Tom Giesel, honorary historian for the National Farmers Union, had this to say about the pending deal: “‘It’ll have a large impact. I have no choice when I purchase inputs, be it seeds, chemicals, whatever. There is no choice. *They own me.*”<sup>101</sup> Regarding farming in general, he added: “‘Now, a lot of how we farm is being determined by someone far away in a boardroom that has little or no connection to the land and what’s happening out there.”<sup>102</sup>

Alicia Harvie, the advocacy and issues director of Farm Aid (a nonprofit organization founded in 1985 by Willie Nelson, Neil Young, and John Mellencamp, whose efforts and annual benefit concerts have raised more than \$50 million to assist family farms<sup>103</sup>), has also expressed concern regarding the recent trend of consolidations.<sup>104</sup> She noted:

Across food and agriculture, the amount of pending mergers and mergers that got green-lighted last year and this year is phenomenal, it’s in the hundreds.... Whatever sector you’re looking at, be it livestock or crops, there’s consolidation going on, and that’s had some pretty dramatic consequences for input costs and costs of production for the availability of who they can market their goods to.<sup>105</sup>

Contrarily, Bayer and Monsanto say that the deal will benefit farmers, as the companies will *focus* on innovative technology.<sup>106</sup> Bayer CEO Werner Baumann downplayed the potential antitrust risks in an interview with CNBC’s “Squawk on the Street.”<sup>107</sup> Said Baumann:

So this actually speaks to the great quality of the combination we have in front of us. And we have very, very little overlap, that is of course going to enable a very, very, let’s say constructive discussion with regulators about their concerns on where we do have these overlaps. But it’s substantially less than in some of the other cases where there are significant product overlaps. This whole transaction and the whole vision we see is driven by growth and innovation and not necessarily

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simply try to minimize the negative consequences of increased consolidation by (3) regulating the behavior of participants and (4) improving the enforcement of competition or trade practice laws.  
*Id.*

<sup>101</sup> Dan Nosowitz, *How Will the Monsanto-Bayer Merger Affect Everyday Farmers?*, MODERN FARMER (Oct. 20, 2016), <http://modernfarmer.com/2016/10/monsanto-bayer-merger-2/> [emphasis added].

<sup>102</sup> *Id.*

<sup>103</sup> *About*, FARM AID, <https://www.farmaid.org/about-us/> (last accessed March 1, 2017).

<sup>104</sup> Nosowitz, *supra* note 101.

<sup>105</sup> *Id.*

<sup>106</sup> Henry Fernandez, *Bayer and Monsanto CEOs: Farmers Need This Deal*, FOX BUS. (Sept. 14, 2016), <http://www.foxbusiness.com/markets/2016/09/14/bayer-and-monsanto-ceos-farmers-need-this-deal.html>.

<sup>107</sup> *First on CNBC: CNBC Transcript: Bayer CEO Werner Baumann and Monsanto CEO Hugh Grant Speak with CNBC’s David Faber on “Squawk on the Street” Today*, CNBC (Sept. 14, 2:29 PM), <http://www.cnbc.com/2016/09/14/first-on-cnbc-cnbc-transcript-bayer-ceo-werner-baumann-and-monsanto-ceo-hugh-grant-speak-with-cnbc-david-faber-on-squawk-on-the-street-today.html>.

huge cost cutting. This combination is going to be driven by highly complimentary product portfolios.<sup>108</sup>

Monsanto's CEO, Hugh Grant, has a goal of "bringing seeds and chemistry alongside data science to shape the industry's future."<sup>109</sup> In a recent interview, Grant stated, "I think at the end of the day it's about opportunity. It is a great deal for our shareholders...but to [Bayer CEO] Werner's point, more importantly, this a great deal for farmers because farmers are starving for innovations."<sup>110</sup> According to Grant, Monsanto is

pleased we received such strong support from our shareowners. This is an important milestone as we work to combine our two complementary companies and deliver on our shared vision for the future of agriculture. By bringing together our expertise and our resources to drive this shared vision, we can do even more together to benefit growers around the world and to help address broad global challenges like climate change and food scarcity.<sup>111</sup>

Supportive shareholders appear to have retained some skepticism, like the farmers; recent stock prices for Monsanto have been traded well below Bayer's offer of \$128.00 per share.<sup>112</sup> Although the deal was approved by Monsanto shareholders, there are reports that at least some are disappointed with the offered price per share.<sup>113</sup> The lower-than-expected offers are potentially due to the current downturn in the farming industry as a whole.<sup>114</sup> Recently, crop prices have gone down.<sup>115</sup> Of course, the deal is not yet official. Currently, the merger has approximately a 50% chance of success,<sup>116</sup> although this number could potentially increase under the Trump Administration, as Republicans have generally been more lenient towards major acquisitions in the United States.<sup>117</sup>

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<sup>108</sup> *Id.*

<sup>109</sup> Fernandez, *supra* note 106.

<sup>110</sup> *Id.*

<sup>111</sup> *Monsanto Shareowners Approve Merger with Bayer*, MONSANTO (Dec. 13, 2016), <http://news.monsanto.com/press-release/corporate/monsanto-shareowners-approve-merger-bayer>.

<sup>112</sup> Schwartz, *supra* note 31.

<sup>113</sup> Alessi & Bunge, *supra* note 10.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Fernandez, *supra* note 106.

<sup>117</sup> President Donald J. Trump was inaugurated on January 20, 2017, signaling a political shift in American politics. In an effort to appeal to the new Republican leader, Bayer has offered an increase in American jobs:

President-elect Donald Trump met with the chief executives of German chemical giant Bayer and agriculture company Monsanto last week and discussed commitments to the U.S. following their planned \$66 billion merger. The Trump team says as a result of the meeting, the companies made new pledges for jobs and research spending in the U.S. In a call with reporters Tuesday, transition



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team spokesman Sean Spicer said Bayer and Monsanto committed to \$8 billion in new R&D spending in the U.S., as well as to retain 100 percent of Monsanto's U.S. workforce, create 3,000 new U.S. high-tech jobs and to keep Monsanto's headquarters in St. Louis. None of this, Spicer said, had been in the works previously.

Meg Tirrell, *Bayer, Monsanto Tout Jobs, Investment Pledge to Trump, But Analysts Question How Much is New*, CNBC (Jan. 17, 2017, 3:16 PM), <http://www.cnbc.com/2017/01/17/bayers-pledge-to-trump-has-some-analysts-scratching-their-heads.html>.

Also signaling the shift:

Separately, the companies promised to spend \$16 billion for research and development in agriculture over the next six years with half of those funds dedicated to the U.S. "This is an investment in innovation and people that will create several thousand new high-tech, well-paying jobs after integration is complete, jobs that will keep America at the forefront of agricultural innovation and that serve U.S. farmers by delivering better products and services faster" according to a joint statement released by Bayer's CEO Werner Baumann and Monsanto chief Hugh Grant.

Charlie Gasparino & Brian Schwartz, *Monsanto Shares Up on Bayer-Trump Promise for Billions in U.S. Investment, Jobs*, FOX BUS. (Jan. 17, 2017), <http://www.foxbusiness.com/markets/2017/01/17/monsanto-shares-up-on-bayer-trump-promise-for-billions-in-u-s-investment-jobs.html>.

Although President Trump is eager to approve the merger for potential job gains, it should be noted that there are potential job losses as well:

Bayer said that geneticists, roboticists, satellite imagery specialists, engineers, data scientists, advanced breeders and statisticians were the types of jobs the combined company would be looking to add. But the Bayer spokesman did not address Spicer's claim that no jobs would be lost. Executives for the two companies had hinted after the merger was announced that it could lead to job cuts on the administrative side of the business to reduce overlap—a common post-merger occurrence. According to a St. Louis Post-Dispatch report after the deal was announced, Liam Condon, head of Bayer's crop science division, told journalists it was a good assumption R&D jobs were safe, but that it was "too early" to say what might happen to administrative jobs.

Paul R. La Monica, *Trump Takes Credit for Saving Monsanto Jobs, But...*, CNN MONEY (Jan. 17, 2017, 3:54 PM), <http://money.cnn.com/2017/01/17/investing/monsanto-bayer-trump-jobs/>.

The National Farmers Union has expressed concerns that the new Administration views the merger in a positive light:

In a statement Tuesday, it said the meeting between the CEOs and president-elect "is deeply disturbing if it leads to an approval of the Bayer-Monsanto acquisition by the incoming Trump Administration." Still, the meeting is "positive" for getting U.S. approval, though the merger still needs regulatory approval in other countries, Chris Shaw, an analyst at Monness Crespi Hardt & Co. in New York, said by phone. Bayer and Monsanto's plan to stay and invest in the U.S. Midwest is key to its business, since it would market to farmers, but also lines up with Trump's rhetoric, said Jason Miner, an analyst at Bloomberg Intelligence in Skillman, New Jersey.

Justin Sink & Mario Park, *Bayer-Monsanto Pledge Investment, Jobs after Trump Meeting*, BLOOMBERG (Jan. 17, 2017, 12:06 PM), <https://www.bloomberg.com/politics/articles/2017-01-17/bayer-to-invest-8-billion-and-add-3-000-jobs-trump-aide-says>.

### C. European Union Antitrust Laws

#### i. The European Union

The European Union, as it stands today, is much younger than the United States.<sup>118</sup> Officially established in 1993, the European Union is comprised of 28 countries: Austria, Belgium, Bulgaria, Croatia, the Republic of Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom.<sup>119</sup> The purpose of the European Union is to operate “a single market which allows free movement of goods, capital, services and people between member states.”<sup>120</sup>

#### ii. The Applicable Laws

With this purpose in mind, it is understandable that competition law is important for the European Union.<sup>121</sup> The Treaty on the Functioning of the European Union details antitrust laws in the European Union.<sup>122</sup> There are two important rules detailed in the Treaty: First, the Treaty “prohibits agreements between two or more independent market operators which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. agreement between a manufacturer and its distributor).”<sup>123</sup> Second, the Treaty “prohibits firms that hold a dominant position on a given market to abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.”<sup>124</sup>

It has been suggested that if one wants to block a large, international merger, he or she should contact the European Union rather than the United States, as “EU antitrust regulators in recent years have been far more receptive to concerns about large mergers or anti-competitive conduct.”<sup>125</sup> For example, a merger proposed in 2001 that would unite General Electric and Honeywell International, Inc. was approved in the United States and denied in the European

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<sup>118</sup> Michael Wilkinson, *What is the EU, Why was it Created and When was it Formed?*, TELEGRAPH (June 22, 2016, 3:56 PM), <http://www.telegraph.co.uk/news/2016/06/20/what-is-the-eu-why-was-it-created-and-when-was-it-formed1/>.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> EUR. COMM’N, *supra* note 12. “**Competition** encourages companies to offer consumers goods and services at the most favourable terms. It encourages efficiency and innovation and reduces prices. To be effective, competition requires companies to act independently of each other, but subject to the competitive pressure exerted by the others.” *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Larry Bumgardner, *Antitrust Law in the European Union*, GRAZIADO BUS. REV., 2005, available at [https://gbr.pepperdine.edu/2010/08/antitrust-law-in-the-european-union/#\\_edn21](https://gbr.pepperdine.edu/2010/08/antitrust-law-in-the-european-union/#_edn21).

Union.<sup>126</sup> General Electric's CEO Jack Welch commented, "'The European regulators' demands exceeded anything I or our European advisers imagined and differed sharply from antitrust counterparts in the U.S. and Canada.'"<sup>127</sup> The key difference between the United States and European Union is enforcement of the laws. While U.S. laws "are in some respects more powerful" than their EU counterparts, "enforcement has been far more vigorous in the EU."<sup>128</sup>

In addition to the Treaty on the Functioning of the European Union, the European Community Treaty contains provisions similar to those of the Sherman Antitrust Act of 1890.<sup>129</sup> First, "Article 81 of the European Community Treaty prohibit[s] cartels and other 'concerted practices' that distort competition.... In general, 'concerted action' for a Section 1 violation means that at least two companies must be involved in restraining trade, as opposed to unilateral action by one business."<sup>130</sup> Second, "[a]ny abuse by one or more undertakings of a dominant position within the common market...shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States."<sup>131</sup>

Updated regulations in 2004 created similarities to the Sherman Antitrust Act, as well as the Clayton Antitrust Act of 1914.<sup>132</sup> Historically, the European Union blocked mergers that created an "abuse of dominant position."<sup>133</sup> The new regulations allow "the EU to block mergers that 'significantly impede effective competition.'"<sup>134</sup> As a result, the new regulations have increased the number of mergers the European Union can block.<sup>135</sup> Unlike the United States, prior court involvement is not required for regulatory agencies to block a proposed merger.<sup>136</sup>

The European Commission is the regulatory agency responsible for enforcing antitrust laws in the European Union, like the FTC.<sup>137</sup> Mergers that require approval by the European Commission must follow rules detailed in the EC Merger Regulation and the Implementing

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> EUR. COMM'N, MERGER CONTROL PROCEDURES, [http://ec.europa.eu/competition/mergers/procedures\\_en.html](http://ec.europa.eu/competition/mergers/procedures_en.html), (last visited Jan. 29, 2017).

Regulation.<sup>138</sup> Additionally, U.S. and EU regulations share some similarities, such as their analysis of potential efficiencies and harms resulting from mergers.<sup>139</sup>

Within the European Commission exists the Directorate General for Competition.<sup>140</sup> This suborganization is responsible for enforcing the parts of the treaty highlighted above.<sup>141</sup> When the European Commission is notified of a pending merger, it is investigated to determine whether the merger would “significantly impede effective competition in the EU.”<sup>142</sup> The merger may then be approved unconditionally if no significant impediments are found to exist.<sup>143</sup> However, if one or more significant impediments *are* found to exist, the merger must be prohibited if “no commitments aimed at removing the impediment are proposed by the merging firms by creating or strengthening a dominant player.”<sup>144</sup> Conditionally approved mergers may be forced to alter their original agreements in various ways, such as “sell[ing] part of the combined business or to license technology to another market player.”<sup>145</sup>

### iii. Problems and Antitrust Violations

As there are similarities in the laws of the United States and the European Union, it could be argued that the merger is potentially illegal under the antitrust laws set forth in the Treaty of the Functioning of the European Union. The companies do not merely have a large presence in the United States; they are global companies that will be subjected to multiple laws, as they could potentially dominate markets in the European Union.<sup>146</sup>

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<sup>138</sup> EUR. COMM’N, MERGERS LEGISLATION, <http://ec.europa.eu/competition/mergers/legislation/legislation.html> (last visited March 1, 2017).

<sup>139</sup> See generally Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 350 (2011).

<sup>140</sup> EUR. COMM’N, PROCEEDINGS FOR THE APPLICATION OF ARTICLES 101 AND 102 TFEU: KEY ACTORS AND CHECKS AND BALANCES, [http://ec.europa.eu/competition/antitrust/key\\_actors\\_en.pdf](http://ec.europa.eu/competition/antitrust/key_actors_en.pdf) (last visited Jan. 29, 2017).

<sup>141</sup> *Id.*

<sup>142</sup> EUR. COMM’N, MERGERS: OVERVIEW, [http://ec.europa.eu/competition/mergers/overview\\_en.html](http://ec.europa.eu/competition/mergers/overview_en.html) (last visited Jan. 29, 2017).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See Lindsey Mattila, *Antitrust Laws and the Bayer-Monsanto Merger*, CLAREMONT J. L. & PUB. POL’Y, Sept. 21, 2016, <https://5clpp.com/2016/09/21/antitrust-laws-and-the-bayer-monsanto-merger/>. Mattila discusses the nature of the deal and general skepticism:

Many antitrust regulators, however, are not quite sold that these benefits outweigh the anticompetitive effects. Agricultural innovation is important to feed the growing global population, making competition in the industry more necessary than ever. These deals reduce competition in an industry that affects everyone worldwide. Were the Bayer-Monsanto deal to be approved, the new company would have control over a quarter of the world’s seed and pesticide stock. Decreased competition could lead to the new company raising prices for seeds and pesticides that are necessary for modern farming, thus raising costs for consumers. American, German, and other governments with authority in this deal want to ensure that there is still fair competition in the market if the two

The companies also have long-standing, sometimes sordid histories and reputations that may be a general sense of concern.<sup>147</sup>

A merger of this magnitude falls within the threshold guidelines of the EU Merger Regulation.<sup>148</sup> The European Commission must examine mergers that meet the following thresholds:

The first alternative requires: (i) a combined worldwide turnover of all the merging firms over €5 000 million, and (ii) an EU-wide turnover for each of at least two of the firms over €250 million. The second alternative requires: (i) a worldwide turnover of all the merging firms over €2 500 million, and (ii) a combined turnover of all the merging firms over € 100 million in each of at least three Member States, (iii) a turnover of over €25 million for each of at least two of the firms in each of the three Member

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companies were to merge. Bayer will have to get approval for antitrust laws in over 30 jurisdictions around the world. *Id.*

*See generally Bayer and Monsanto to Create a Global Leader in Agriculture*, BAYER (Sept. 14, 2016), <http://www.press.bayer.com/baynews/baynews.nsf/id/ADSF8F-Bayer-and-Monsanto-to-Create-a-Global-Leader-in-Agriculture>. This is a press release issued by Bayer in response to the pending merger, and contains the following description of each company:

Bayer is a global enterprise with core competencies in the Life Science fields of health care and agriculture. Its products and services are designed to benefit people and improve their quality of life. At the same time, the Group aims to create value through innovation, growth and high earning power. Bayer is committed to the principles of sustainable development and to its social and ethical responsibilities as a corporate citizen. In fiscal 2015, the Group employed around 117,000 people and had sales of EUR 46.3 billion. Capital expenditures amounted to EUR 2.6 billion, R&D expenses to EUR 4.3 billion. These figures include those for the high-tech polymers business, which was floated on the stock market as an independent company named Covestro on October 6, 2015.... Monsanto is committed to bringing a broad range of solutions to help nourish our growing world. We produce seeds for fruits, vegetables and key crops—such as corn, soybeans, and cotton—that help farmers have better harvests while using water and other important resources more efficiently. We work to find sustainable solutions for soil health, help farmers use data to improve farming practices and conserve natural resources, and provide crop protection products to minimize damage from pests and disease. Through programs and partnerships, we collaborate with farmers, researchers, nonprofit organizations, universities and others to help tackle some of the world’s biggest challenges. *Id.*

<sup>147</sup> Lydia Mulvany, *Heroin, Nazis, and Agent Orange: Inside the \$66 Billion Merger of the Year – These Companies Used to Sell Heroin and Agent Orange. Now, They Want to Form the World’s Largest Supplier of Seeds and Pesticides*, BLOOMBERG (Sept. 14 2016, 1:09 PM), <https://www.bloomberg.com/news/articles/2016-09-14/the-heroin-laced-history-behind-the-year-s-biggest-deal>. Although Bayer attempts to maintain a clean reputation, especially considering protests against Monsanto, “Two friends making dyes from coal-tar started Bayer in 1863, and it developed into a chemical and drug company famous for introducing heroin as a cough remedy in 1896, then aspirin in 1899. The company was a Nazi contractor during World War II and used forced labor. The company was a Nazi contractor during World War II and used forced labor.” *Id.* Monsanto, already hated for its contribution to the GMO industry, also has a dark past: “It’s famous for making some controversial and highly toxic chemicals like polychlorinated biphenyls, now banned and commonly known as PCBs, and the herbicide Agent Orange, which was used by the U.S. military in Vietnam.” *Id.*

<sup>148</sup> EUR. COMM’N, MERGER CONTROL PROCEDURES, *supra* note 137.

States included under ii, and (iv) EU-wide turnover of each of at least two firms of more than €100 million.”<sup>149</sup>

At \$66 billion, the proposed merger must be examined by the European Commission.<sup>150</sup>

iv. European Union Agribusiness

Agribusiness experts in the European Union have raised similar concerns to those in the United States.<sup>151</sup> Margrethe Vestager, the European Union’s antitrust chief, recently stated that “that farmers must continue to have a choice when buying seeds and pesticides after the merger between Bayer and Monsanto.”<sup>152</sup> With an already concentrated market, choice may prove difficult.<sup>153</sup> As in the United States, consumer selection may be significantly diminished, and prices may potentially rise.<sup>154</sup> As noted previously, the companies believe the merger will benefit farmers due to innovative technology.<sup>155</sup> One key difference is that unlike the United States, where Monsanto has a large presence in the genetically modified crop industry, the European Union has strict regulations and prohibitions against the use of genetically modified organisms (GMOs).<sup>156</sup>

While not unique to the European Union, concerns about GMOs are much more prevalent in the EU than in the United States.<sup>157</sup> In the United States, GMOs are commonplace; in the European Union, Monsanto is viewed as a villain.<sup>158</sup> “Monsanto has become the main target of the anti-GMO movement globally—particularly in Europe, where it faces ongoing controversy over its most widely-used weed killer glyphosate, which environmentalists continue to seek to ban.”<sup>159</sup>

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<sup>149</sup> *Id.*

<sup>150</sup> See generally *Foreign Exchange Rates*, BOARD OF GOVERNORS OF THE FED. RES. [https://www.federalreserve.gov/releases/h10/hist/dat00\\_eu.htm](https://www.federalreserve.gov/releases/h10/hist/dat00_eu.htm) (last visited Jan. 30, 2017). As of January 27, 2017, the exchange rates between Euros and United States Dollars is 1.0690. *Id.*

<sup>151</sup> *Farmers Must Have Choice Post Bayer-Monsanto Merger—EU’s Vestager*, REUTERS (Sept. 15, 2016, 10:07 AM), <http://www.reuters.com/article/monsanto-ma-bayer-eu-idUSP6N196041>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Plumer, *supra* note 93.

<sup>155</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>156</sup> Tyler Cowen, *People Aren’t Thinking Straight about Bayer and Monsanto*, BLOOMBERG (Sept. 19, 2016, 10:45 AM), <https://www.bloomberg.com/view/articles/2016-09-19/people-aren-t-thinking-straight-about-bayer-and-monsanto>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> Edel-Quinn Agbaegbu, *The Impact of Bayer-Monsanto Merger on GMOs in Europe and Africa*, EWHC BLOG (Oct. 6, 2016), <http://everywomanhopecentre.org/news/blog/2016/10/06/the-impact-of-bayer-monsanto-merger-on-gmos-in-europe-and-africa/>.

The company has sparked global protests, some of them occurring annually.<sup>160</sup> The anti-Monsanto sentiment is so strong that, should the merger be approved by regulators, many doubt that Bayer will continue to use the Monsanto name.<sup>161</sup>

Part of Bayer's strategy in acquiring Monsanto is to create a global behemoth in the production of crops through so called genetically modified organisms—a technology that can mass produce food at a relatively low cost. But the so-called GMO business is controversial and Monsanto—the biggest GMO producer—has faced a wave of protests from consumer advocates who believe these types of crops lead to severe health problems for those who consume them.<sup>162</sup>

Of course, political sentiments can change. A recent seminar at the European Union Parliament discussed the impact of GMOs “with the objective to unshackle innovation in agricultural biotechnology so that it reaches the farmers to feed the growing global population.”<sup>163</sup> Many industry experts have spoken about the importance of GMOs in a world filled with hungry and malnourished people.<sup>164</sup> The seminar, *Unshackling Innovation: Will Europe Block or Enable GM Crops?*, was organized by Public Research and Regulation Initiative (PRRI) and EuropaBio, both members of the biotechnology industry.<sup>165</sup>

As these political concerns will undoubtedly weigh heavily on regulators' minds in the coming months, the recently proposed DuPont-Dow merger may shed some light on how European authorities will treat the proposed business deal.<sup>166</sup> Like the Bayer-Monsanto merger, the DuPont-Dow merger is also pending; however, it is expected to close in June 2017.<sup>167</sup> Should DuPont-Dow deal fail to gain approval of European antitrust authorities, it is likely the proposed Bayer-Monsanto merger will follow suit.<sup>168</sup>

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<sup>160</sup> *Id.*

<sup>161</sup> Dave Keating, *What the Bayer-Monsanto Merger Means for Food, Farmers and the Environment*, DEUTSCHE WELLE (Sept. 15, 2016), <http://www.dw.com/en/what-the-bayer-monsanto-merger-means-for-food-farmers-and-the-environment/a-19296103>.

<sup>162</sup> Schwartz, *supra* note 31.

<sup>163</sup> *Will Europe Block or Enable GM Crops? Seminar at EU Parliament Tackles GM Crops Concerns*, EWHC BLOG (Oct. 8, 2016), <http://everywomanhopecentre.org/news/blog/2016/10/08/will-europe-block-or-enable-gm-crops-seminar-at-eu-parliament-tackles-gm-crops-concerns/>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Josh Kosman, *DuPont-Dow Merger May Signal How EU Will Handle Bayer-Monsanto*, N.Y. POST (Jan. 25, 2017, 11:40 PM), <http://nypost.com/2017/01/25/dupont-dow-merger-may-signal-how-eu-will-handle-bayer-monsanto/>.

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

Currently, the DuPont-Dow deal has resulted in “serious European regulator pushback,” and the companies have been delayed three months in their attempts to gain approval.<sup>169</sup> Some sources in Washington, DC, do not believe the merger will be successful in the European Union.<sup>170</sup> Recently, European Union antitrust chief “Margrethe Vestager said that both companies face a ‘still very open’ outcome.”<sup>171</sup> Concerns focus on the industry as a whole becoming more consolidated.<sup>172</sup>

#### *D. Illegality and Detriment*

Currently, the Bayer-Monsanto merger has raised concerns in the United States and the European Union,<sup>173</sup> where it is being reviewed before the acquisition can officially become binding. Based on current precedent, the merger is illegal in both the U.S. and EU. To protect agribusiness in both locations, the merger should be blocked.

The Bayer Monsanto merger is a direct violation of the Clayton Act. The Clayton Act prohibits any merger that substantially lessens competition.<sup>174</sup> Per the United States Supreme Court,

a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.<sup>175</sup>

The Bayer Monsanto merger clearly fits this mold. Allowing the two companies to combine would mean that one company controlled 28% of the global pesticide market and significant amount of the corn and soybean industries.<sup>176</sup> When one company controls more than a quarter of any given market, there is a clear argument that competition is lacking in this market.

The merger is also illegal under the European Union antitrust laws. The Treaty on the Functioning of the European Union “prohibits agreements between two or more independent market operators which restrict competition.”<sup>177</sup> Additionally, the European Committee must not

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<sup>169</sup> *Id.*

<sup>170</sup> Josh Kosman, *supra* note 166. *DuPont-Dow Merger Faces Stiff EU Resistance*, N.Y. POST (Jan. 15, 2017, 11:25 PM), <http://nypost.com/2017/01/15/dupont-dow-merger-faces-stiff-eu-resistance/>.

<sup>171</sup> Richard Saintvilus, *Dow, DuPont EU Merger Decision “Still Very Open”*, INVESTOPEDIA (Jan. 10, 2017, 9:35 AM), <http://www.investopedia.com/news/dow-dupont-eu-merger-decision-still-very-open-dow-ddw/>.

<sup>172</sup> *Id.*

<sup>173</sup> Plumer, *supra* note 93.

<sup>174</sup> Clayton Antitrust Act of 1914, *supra* note 57.

<sup>175</sup> Stucke & Grunes, *supra* note 86.

<sup>176</sup> Keating, *supra* note 161.

<sup>177</sup> EUR. COMM’N, *supra* note 2.



allow mergers that exceed the threshold limits<sup>178</sup> if they “significantly impede effective competition.”<sup>179</sup> Bayer and Monsanto are currently two independent market operators. If they are permitted to merge, this merger would restrict competition in agribusiness, predominantly in the global pesticide and seed markets.<sup>180</sup> Therefore, the merger should be prohibited by the European Committee.

The deal benefits the corporations, but creates problems for farmers and consumers worldwide.<sup>181</sup> Farmers will become even more limited with regard to the equipment they need to run their farms effectively (i.e., seeds and pesticides).<sup>182</sup> They will be forced to buy Bayer-Monsanto seeds, and protect them with Bayer-Monsanto pesticides.<sup>183</sup> Should the Bayer-Monsanto combination decide to raise its prices, those increases will further strain an already downturned agricultural industry.<sup>184</sup>

There is also likely to be less innovation in the farming industry.<sup>185</sup> Despite Bayer’s claim that the purpose of the merger is innovation,<sup>186</sup> the reality is when there is less competition, there is less of a need to continuously improve one’s product in order to convince the public to buy your product. These corporations exist to make a profit. Regardless of their noble intents, they owe a fiduciary duty to their shareholders to make the company as profitable as possible.

The merger is also a dangerous political move in both the United States and the European Union, for different reasons. In the United States, people have already reached out to their public officials with concerns about the merger.<sup>187</sup> These officials, particularly members of Congress,

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<sup>178</sup> EUR. COMM’N, MERGERS LEGISLATION, *supra* note 138.

<sup>179</sup> EUR. COMM’N, MERGERS: OVERVIEW, *supra* note 142.

<sup>180</sup> Cowen, *supra* note 156.

<sup>181</sup> Kennedy, *supra* note 84.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Plumer, *supra* note 93.

<sup>186</sup> Fernandez, *supra* note 106.

<sup>187</sup> *Utahns: Sign the Letter to Sen. Mike Lee and Tell Him to Stand Up to Monsanto!*, SUMOFUS <https://actions.sumofus.org/a/email-senator-mike-lee-and-tell-him-to-stand-up-to-monsanto/> (last visited Jan. 30, 2017). This is a petition that SumOfUs is urging citizens in Utah to sign; the following letter will be submitted on each signer’s behalf: “Dear Senator Lee,

I’m writing to thank you for your past leadership regarding increased business concentration in our nation and the proper role of antitrust laws in safeguarding competition and innovation. As one of your constituents, I want to express to you how deeply alarmed I am by the recent proposed merger of A.G. Bayer and Monsanto. Even more alarming, this merger is occurring in the midst of several other mergers in the agricultural sector. As I’m sure you know, our farmers are increasingly squeezed from both sides in their business. They pay high prices for seeds and other inputs, and the price they can sell for is kept down by concentration in the distribution market. We need our farmers as stewards of the land and as producers of our food. This merger is bad for them. That is why I’m particularly concerned about the Bayer-Monsanto merger from an innovation and environmental perspective. We already have too little research and innovation in this field. And the companies that

need the support of the public so that they may be reelected. For example, SumOfUs has organized a letter to Senator Mike Lee to encourage him to oppose the deal: “Utah Senator Mike Lee is among the few to voice concern over this merger. Sen. Lee is up for re-election in November—which means he will be especially receptive to our call to do the right thing.”<sup>188</sup>

In the European Union, public opinion about GMOs is so negative that supporting a merger between Bayer and Monsanto would not be a good choice politically.<sup>189</sup> Bayer itself appears to be depending on its own strong reputation to counterbalance Monsanto’s overly poor one.<sup>190</sup> Although the European Union generally has stronger opposition than the United States to mergers such as this,<sup>191</sup> any support for a merger that would give Monsanto additional power in Europe is likely to be faced with strong political opposition.

### III. CONCLUSION

Both the United States and the European Union have well-established antitrust laws. In the United States, the Federal Trade Commission and the Department of Justice Antitrust Division work side-by-side to enforce four main pieces of legislation: the Sherman Antitrust Act of 1890, the Clayton Act of 1914, the Federal Trade Commission Act, and the Hart-Scott-Rodino Antitrust Improvement Act of 1976.<sup>192</sup> In the European Union, the European Commission acts to enforce the antitrust provisions established in the Treaty on the Functioning of the European Union.<sup>193</sup> In the United States, the goal is to prevent mergers and acquisitions that will “substantially lessen competition.”<sup>194</sup> In the European Union, the goal is to prevent mergers and acquisitions that will “significantly impede effective competition.”<sup>195</sup>

Either way it is phrased, the pending Bayer Monsanto deal is a direct violation of antitrust laws in the United States and the European Union. It faces strong opposition from both farmers<sup>196</sup> and anti-GMO activists.<sup>197</sup> The merger would put approximately 28% of the global pesticide

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do innovate are locked into research programs that create toxic products that imperil our food safety and the earth we live on. Bayer-Monsanto would make an already bad situation dire. I know you care about these things. Please strongly opposed the merger in a letter to the Department of Justice and other appropriate federal agencies. *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> Associated Press, *supra* note 9.

<sup>190</sup> *Id.*

<sup>191</sup> Fernandez, *supra* note 106.

<sup>192</sup> FTC, GUIDE TO ANTITRUST LAWS, *supra* note 2.

<sup>193</sup> EUR. COMM’N, *supra* note 2.

<sup>194</sup> FTC, THE ENFORCERS, *supra* note 62.

<sup>195</sup> EUR. COMM’N, MERGERS: OVERVIEW, *supra* note 142.

<sup>196</sup> NFU Condemns Bayer/Monsanto Deal, *supra* note 98.

<sup>197</sup> Nicola & Jennen, *supra* note 35.

market into the company's hands, as well as create an overly large presence in the seed industry.<sup>198</sup> Farmers would have extremely limited choices,<sup>199</sup> and could potentially be subjected to higher prices and a lack of innovation.<sup>200</sup>

For the reasons outlined above, the Federal Trade Commission, Department of Justice Antitrust Division, and the European Committee should all block the pending merger between agribusiness giants Bayer and Monsanto.

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<sup>198</sup> Keating, *supra* note 161.

<sup>199</sup> Court, *supra* note 94.

<sup>200</sup> Plumer, *supra* note 93.