

*Translation from German into English*

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**Statement on the Legal Opinion dated 18 April 2019**

on the question of whether the members of the Board of Management of Bayer AG were acting in line with their duties under German stock corporation law when taking the decision to enter into and to close the “Agreement and Plan of Merger” with Monsanto Company, in particular concerning the liability risks arising from the glyphosate business,

prepared on behalf of  
the Supervisory Board of Bayer AG, Leverkusen

## **I. Background to the statement**

### **1. Legal Opinion dated 18 April 2019**

In his legal opinion dated 18 April 2019 prepared on behalf of Bayer AG's Supervisory Board ("**Legal Opinion**"), the undersigned addressed the question of whether the members of Bayer AG's Board of Management were acting in line with their duties under German stock corporation law when taking the decision to enter into and to close the "Agreement and Plan of Merger" with Monsanto Company, in particular concerning the liability risks arising from the glyphosate business.

In particular, the minutes of the relevant meetings of Bayer AG's Supervisory Board covering the period between the spring of 2016 and June 2018 ("**Transaction Period**"), related letters (including annexes) sent by Bayer AG's Board of Management to Bayer AG's Supervisory Board and memoranda dated 6 April 2016, 22 July 2016, 30 August 2016, 5 October 2016 and 8 November 2018 which Bayer AG had commissioned from a U.S. law firm in connection with acquiring Monsanto and closing the Monsanto transaction (the "**Memoranda**") were available to the undersigned when he prepared the Legal Opinion. The total set of documents made available to the undersigned at that time amounted to several thousand pages.

The overall conclusion of the Legal Opinion is the following:

"It can be ruled out pursuant to section 93 para. 1 sentence 2 of the German Stock Corporation Act (*Aktengesetz – AktG*) that the members of Bayer AG's Board of Management acted in breach of their duty of care in connection with the conclusion and closing of the merger agreement: the decision to enter into the merger agreement and the decision to close the merger agreement are entrepreneurial by nature, and it holds true for both of these decisions that the members of the Board of Management were reasonably entitled to assume that they were acting on the basis of adequate information and in the company's best interest."

## **2. Agreement between Bayer AG and one of its shareholders**

An agreement between Bayer AG and one of its shareholders regarding the conduct of a voluntary special audit ("**Agreement**") provides that Bayer AG will submit a detailed statement on the Legal Opinion which shows the line of reasoning applied to the question of whether the Board of Management and the Supervisory Board complied with their duties under German stock corporation law and which confirms (if necessary, by supplementing the Legal Opinion) that:

- the Memoranda were available to the expert,
- the Memoranda were a suitable decision-making basis for Bayer AG's Board of Management with respect to assessing the Roundup/glyphosate-related risks at the time of entering into the Monsanto transaction and at the last possible time of rescinding the merger agreement,
- Bayer AG's Board of Management acted in line with any recommendations included in the Memoranda and that
- Bayer AG's Board of Management acted in line with its duties in taking the decisions to enter into and to close the merger agreement.

The expert is able to confirm the assumptions set out in the above dash bullets, though the Memoranda do not include any recommendations for action to Bayer AG's Board of Management.

## **3. Risk of a loss of legal privileges**

Pursuant to the Agreement the below statement may not include any statements that, according to the assessment made by the adviser to the committee responsible for the glyphosate-related legal complex which had been set up by Bayer AG's Supervisory Board, Mr John H. Beisner, in line with his duties, are suitable to give rise to the risk of a loss of legal privileges. On 9 January 2020, the undersigned was informed in a detailed call with Mr Beisner of what kind of statements would give rise to the risk of a loss of legal privileges. In the light of this, the below detailed statement does not include any

information on the Memoranda's specific contents; nor does the statement specifically refer to the contents of any of the other documents available to the undersigned at that time.

## **II. Material content of the Legal Opinion dated 18 April 2019**

The Legal Opinion comes to the conclusion that it can be ruled out pursuant to section 93 para. 1 sentence 2 of the German Stock Corporation Act that the members of Bayer AG's Board of Management acted in breach of their duty of care in connection with entering into and closing the merger agreement. This is because the decisions made by the Board of Management to enter into and to close the merger agreement with Monsanto are subject to the requirements of the *business judgement rule* under section 93 para. 1 sentence 2 of the German Stock Corporation Act, according to which members of the board of management who make entrepreneurial decisions do not act in breach of their duty provided that, when making these decisions, they were reasonably entitled to assume that they were acting on the basis of adequate information and in the company's best interest. On the basis of the considerations summarised below (largely without providing any references to case law or legal literature), the Legal Opinion comes to the conclusion that when making their decisions to enter into and to close the merger agreement with Monsanto the members of Bayer AG's Board of Management did not act in breach of their duty of care.

### **1. Decision to enter into the merger agreement**

#### **a) Overview**

First of all, as far as the decision to enter into the merger agreement is concerned, the criteria of the business judgement rule under section 93 para. 1 sentence 2 of the German Stock Corporation Act must be applied. According to these criteria, there is no breach of the duty of care within the meaning of section 93 para. 1 sentence 1 of the German Stock Corporation Act where a member of the board of management who made an entrepreneurial decision was reasonably entitled to assume that he was acting on the basis of adequate

information and in the company's best interest. Accordingly, what is required is, first of all, the existence of an entrepreneurial decision (see b) below). Secondly, that member of the board of management must have been reasonably entitled to assume that the basis of information available to him was sufficient (see c) below). Furthermore, that member of the board of management must have been reasonably entitled to assume that he was acting in the company's best interest, which is always the case if such member of the board of management acted free of special interests and inappropriate influence (see d) below), if the risks associated with the entrepreneurial decision were not misjudged in an utterly irresponsible manner (i.e. if the decision is not "absolutely unreasonable" (*schlechthin unvertretbar*), see e) below) and if such member of the board of management acted in good faith (*in gutem Glauben*) and consequently believed that the decision he made was correct (see f) below).

**b) Entrepreneurial decision**

First of all, as far as the entrepreneurial decision required pursuant to section 93 para. 1 sentence 2 of the German Stock Corporation Act is concerned, such decision is characterised by the fact that it has forward-looking elements and elements which are dependent on forecasts, granting members of the board of management margins of discretion, which, in turn, give rise to the requirement of a margin of entrepreneurial discretion. In this respect, an entrepreneurial decision differs from a non-discretionary decision (*gebundene Entscheidung*) where the member of the board of management must act in the way required by law, as a result of which there are no other options of conduct – and thus there is no margin of discretion. M&A transactions of any type are clear cases of entrepreneurial decisions. Therefore, the decision by the members of Bayer AG's Board of Management to enter into the merger agreement with Monsanto qualifies without any doubt as an entrepreneurial decision, too.

**c) Sufficient information basis**

(i) It is true that, with regard to the requirements a ‘sufficient information basis’ has to meet, the Federal Court of Justice (*Bundesgerichtshof – BGH*) held, in respect of a limited liability company under German law (*Gesellschaft mit beschränkter Haftung – GmbH*), that “in the specific decision situation, all sources of factual and legal information available” must have been exhausted and, on this basis, the advantages and disadvantages of the existing options for action must be carefully assessed and all identifiable risks must be accounted for,

[*case law reference*].

However, this may not be (mis-)interpreted to the effect that any conceivable source of information must be used. Such an interpretation would not only be in contradiction to the clear wording of section 93 para. 1 sentence 2 of the German Stock Corporation Act, but would also fail to properly account for the variety of both entrepreneurial decisions and relevant decision situations. In actual fact, it is likely that the Federal Court of Justice, by taking into account the “specific decision situation” and the information “available” in that situation, also requires, in line with the criterion of adequacy pursuant to section 93 para. 1 sentence 2 of the German Stock Corporation Act, that the information basis used take into account the scope and urgency of the decision in question and the costs of obtaining the information – and thus be adequate for the particular situation,

arguing along similar lines: Federal Court of Justice (5<sup>th</sup> Criminal Panel (*Strafsenat*)) [*case law reference*]: the specific decision situation is the reference framework for the scope of the information duties; [*further case law reference*]

This is particularly true in the light of the fact that section 93 para. 1 sentence 2 of the German Stock Corporation Act refers to the fact that the member of the board of management “was reasonably entitled to assume” that he was acting on the basis of adequate information, and thus relativises the strictly objective

approach established prior to the provision entering into force. Despite the fact that this relativisation is likely not to have too much practical significance for transactions with a significant investment volume and corresponding risks, it still holds true that the aforementioned “proceduralisation” of the requirements governing the standard of care to be applied and the relevance of adopting an ex ante perspective are the end of the matter,

reference is made to the example of the acquisition of a UMTS licence by Telekom AG [*case law reference*]: “The objection raised in the appeal on points of law (*Revisionsrüge*), according to which the appellate court was wrong in holding that the claimant’s allegation that the “events leading to loss or damage” had been foreseeable at the time of the auction was unsubstantiated, is unfounded. This is because the Higher Regional Court (*Oberlandesgericht – OLG*) assumed, in a way that is unobjectionable according to the provisions governing the appeal on points of law, that it was not possible to derive from any critical statements made in the period subsequent to the auction that participation in the auction might constitute a breach of duty, as a result of the ex ante assessment being relevant in accordance with section 317 para. 2 of the German Stock Corporation Act”.

In addition, it also applies in the context of section 93 para. 1 sentence 2 of the German Stock Corporation Act that the board of management may have employees and advisers assist it in obtaining information; in accordance with general principles of the doctrine of delegation, it is incumbent on the board of management in this context to carefully select, instruct and monitor the personnel.

(ii) In the case under assessment, the members of the Board of Management were reasonably entitled to assume that, particularly with regard to the liability risks arising from the glyphosate business, they were making the decision on the conclusion of the merger agreement on the basis of adequate information. In this context, the Memoranda were a material information basis that was adequate within the meaning of section 93 para. 1 sentence 2 of the German Stock Corporation Act and sufficient in combination with other sources of information used.

Comprehensive information on the material opportunities and risks of the transaction, including the risks arising from Monsanto's glyphosate business and an assessment of these risks, was available to the Board of Management before the takeover was entered into. The detailed information on the liability risks arising from Monsanto's glyphosate business was in turn based on the Board of Management having ensured that comprehensive information on the scientific findings and the risks related to glyphosate was made available to it and analysed. The Board of Management took the findings resulting from these documents and their subsequent updates into account on an ongoing basis in the further takeover process until the closing of the takeover. In addition, the Board of Management ensured that the assessments *inter alia* on the liability risks arising from Monsanto's glyphosate business that had been made available to it were confirmed by Monsanto in the course of a due diligence process prior to the conclusion of the merger agreement, and acted in line with these assessments.

Against this backdrop, there can be no doubt that the Board of Management of Bayer AG fully complied with its duty to create an adequate information basis with regard to the liability risks arising from the glyphosate business, which then enabled it to make a decision on the conclusion of the merger agreement that was guided by the interests of Bayer AG.

**d) Acting free of special interests and inappropriate influence**

By demanding that a member of the board of management was reasonably entitled to assume that he was acting in the company's best interest, section 93 para. 1 sentence 2 of the German Stock Corporation Act first of all requires that the relevant member of the board of management acted free of special interests and inappropriate influence. In the case under assessment, there are no indications that the members of the Board of Management did not make their decision in an objective and unbiased manner and free of conflicts of interest.

**e) Reasonableness of the decision**

(i) The requirement that a member of the board of management was reasonably entitled to assume that he was acting in the company's best interest further relates to the contents of the decision made by the board of management. In this context, however, the court does not have to examine whether the board of management made the "right" decision. Section 93 para. 1 sentence 2 of the German Stock Corporation Act rather "proceduralises" the requirements for a decision of the board of management that is in line with the relevant standard of care and merely lets the court conduct a rough review of the acts of the board of management; the only thing that has to be ascertained is that the decision made by the board of management is not unreasonable from an ex ante perspective, i.e. in particular that it is not obviously to the detriment of the company and that it does not give rise to irresponsible risks. Against this backdrop, the board of management must, in the context of its decision on the acquisition of an enterprise, recognise the opportunities and risks of the transaction and weight and assess these opportunities and risks, taking into account both the contractual risk distribution and the agreed consideration as well as the entrepreneurial strategy pursued by it.

(ii) Judged by these standards, the members of the Board of Management of Bayer AG were, when making their decision on the conclusion of the merger agreement, reasonably entitled to assume that they were acting in the company's best interest. Absolutely comprehensible strategic considerations, including the consolidation in the agricultural industry market, the complementarity of Bayer and Monsanto and the potential for cost synergies and sales synergies, were decisive for the decision of the Board of Management; in addition, the Board of Management made the assumption – which was also absolutely comprehensible – that the conditions of the takeover negotiated with Monsanto were attractive for Bayer and that the financial burden associated with the obligation to pay the acquisition price was bearable.

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The Board of Management considered the risks associated with the acquisition to be manageable – which is also absolutely plausible. This does not only apply to the political and regulatory risks as well as the reputational risks perceived by the Board of Management and taken into account in its weighing decision but also to the liability risks arising from the glyphosate business, which were equally perceived by the Board of Management and taken into account in its weighing decision. Therefore, the Board of Management of Bayer AG permissibly assumed on the basis of the information obtained by it and the analysis of the prospects of success of pending or possible lawsuits that the liability risks were low.

This assessment of the Board of Management of Bayer AG was in particular plausible and absolutely reasonable because there was global consensus among all national scientific assessment agencies that glyphosate-based herbicides are not carcinogenic when used appropriately. The Board of Management of Bayer AG did not have to make a different assessment of the risk situation on the basis of the IARC study cited in the lawsuits, either; the fact that this study is only suitable to a very limited extent to provide proof that glyphosate is carcinogenic is already evident from the fact that, according to this study as well, glyphosate was only classified into category “2A” – i.e. into the category which also includes substances such as hot beverages above 65° Celsius and working as a hairdresser as potentially carcinogenic.

Given the fact that, from the perspective of the Board of Management, the probability that liability risks arising from the glyphosate business would materialise was low, the circumstance that the theoretically conceivable maximum liability for damages resulting from the glyphosate-related lawsuits might be very high does also not change the fact that the decision to enter into the merger agreement was reasonable. What is decisive in this context is that, from the perspective of the Board of Management, the considerable opportunities associated with the acquisition of Monsanto were obviously

greater than the risk of material liability arising from glyphosate-related lawsuits, which was very low from the ex ante perspective that is relevant in this context.

(iii) In consideration of all the foregoing, when entering into the merger agreement, the members of the Board of Management of Bayer AG were permitted to assume, also with regard to the liability risks arising from the glyphosate business, that they were acting in the company's best interest when entering into the merger agreement.

**f) Acting in good faith**

Finally, the members of the Board of Management of Bayer AG acted in good faith in connection with the decision on the conclusion of the merger agreement. The members of the Board of Management of Bayer AG were convinced that the acquisition of Monsanto at the conditions set out in the merger agreement was in the interests of Bayer AG.

**g) Conclusion**

The decision of the Board of Management of Bayer AG on the conclusion of the merger agreement is entrepreneurial by nature within the meaning of section 93 para. 1 sentence 2 of the German Stock Corporation Act. In addition, the members of the Board of Management of Bayer AG were reasonably entitled to assume in connection with this decision that they were acting on the basis of adequate information and in the company's best interest. Consequently, all requirements of the business judgement rule set out in section 93 para. 1 sentence 2 of the German Stock Corporation Act are met, which in turn means that the members of the Board of Management of Bayer AG did not act in breach of their duty of care in connection with the decision on the conclusion of the merger agreement.

## **2. Decision to close the merger agreement**

### **a) Overview**

As regards the decision of the Board of Management of Bayer AG to refrain from unilaterally preventing the antitrust authority's approval of the closing of the takeover and then terminating the merger agreement on this basis against the payment of a reverse break fee in the amount of U.S.\$2 billion to Monsanto, there is also no breach of the Board of Management's duty of care within the meaning of section 93 para 1 sentence 1 of the German Stock Corporation Act if the decision of the Board of Management on the closing of the merger agreement meets the requirements of the business judgement rule set out in section 93 para. 1 sentence 2 of the German Stock Corporation Act.

### **b) Entrepreneurial decision**

The decision of the Board of Management to close the merger agreement is undoubtedly entrepreneurial by nature within the meaning of section 93 para. 1 sentence 2 of the German Stock Corporation Act: the Board of Management had to choose between two options for action (so that it was not a non-discretionary decision) and to predict the consequences of both alternatives.

### **c) Sufficient information basis**

In addition, when making its decision to close the merger agreement, the Board of Management of Bayer had a sufficient information basis also with regard to the liability risks in connection with Monsanto's glyphosate business. Even after the conclusion of the merger agreement and until the closing of the takeover of Monsanto, the Board of Management repeatedly dealt with the progress of the takeover process and gave detailed reports to the Supervisory Board on an ongoing basis. Specifically with regard to possible liability risks in connection with Monsanto's glyphosate business, the Board of Management was able to rely on updated information on pending or possible lawsuits, including in

particular the updated Memorandum, when making its decision to close the merger agreement.

**d) Acting in the company's best interest**

(i) Also in connection with the decision on the closing of the merger agreement, no indications exist that the members of the Board of Management did not make their decision in an objective and unbiased manner and free of conflicts of interest.

(ii) In addition, the decision of the Board of Management to close the merger agreement was not unreasonable from the ex ante perspective that is exclusively relevant in this context, so that, in this context as well, the members of the Board of Management were entitled to assume that they were acting in Bayer AG's best interest. It was first of all decisive for the decision of the Board of Management that the value creation potential of the takeover of Monsanto was unchanged as compared to plans of 2016, that the takeover of Monsanto was still very attractive and that it continued to meet the expectations initially associated with the transaction.

Specifically in connection with the liability risks arising from the glyphosate business, the Board of Management was entitled to assume that these risks had not significantly changed after the conclusion of the merger agreement. It is true that the number of lawsuits pending against Monsanto had increased considerably. However, according to current scientific knowledge, still no risk of a carcinogenic effect on humans had to be expected if glyphosate was used appropriately and for the purposes intended, and the U.S. EPA had also announced that it continued to assume that glyphosate was not likely to be carcinogenic at relevant dose levels. In line with the update of the risk assessment obtained by it after the conclusion of the merger agreement, the Board of Management did not have to assume on the basis of the considerably greater number of lawsuits that the liability risk had also increased in substantive terms.

Especially against the backdrop that the termination of the merger agreement would not only have deprived Bayer of the opportunities of the takeover but would also have resulted in Bayer being obliged to pay a reverse break fee in the amount of U.S.\$2 billion, the decision of the Board of Management to close the takeover was reasonable in every respect from the ex ante perspective that is exclusively relevant in this context.

(iii) Finally, the members of the Board of Management of Bayer AG were also convinced when making their decision on the closing of the merger agreement that the acquisition of Monsanto was in the interest of Bayer AG; therefore, they also acted in good faith when making this decision.

**e) Conclusion**

The decision of the Board of Management of Bayer AG to comply with the requirements imposed by the antitrust authorities and to close the merger agreement is entrepreneurial by nature within the meaning of section 93 para. 1 sentence 2 of the German Stock Corporation Act. In addition, the members of the Board of Management of Bayer AG were reasonably entitled to assume in connection with this decision that they were acting on the basis of adequate information and in the company's best interest. Consequently, all requirements of the business judgement rule set out in section 93 para. 1 sentence 2 of the German Stock Corporation Act are met, which in turn means that the members of the Board of Management of Bayer AG did not act in breach of their duty of care in connection with the decision on the closing of the merger agreement, either.

*[signature]*

Pullach, 6 February 2020

Prof Dr Mathias Habersack