



Will DOJ/USDA workshops lead to any anti-trust actions?

By Sara Wyant

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Washington, Dec. 3. In a free enterprise system, those who work hard, make wise buying and selling decisions, and invest in their future are usually the ones who grow and stay in business. But at what point does a business grow too big and make it almost impossible for others to compete? At what point do buyers or sellers have so much control that they can manipulate prices and negatively impact consumers?

Those are some of the questions that the U.S. Department of Justice (DOJ) and the U.S. Department of Agriculture (USDA) plan to explore next year in a series of workshops held around the country to examine the current agricultural marketplace with an eye toward competition issues. (See dates and locations at www.Agri-Pulse.com) The workshops deliver on then candidate Barack Obama's campaign pledge last year to investigate concerns elevated during roundtable discussions with producers, including some persistent critics of farm and food industry concentration

At this point, the workshop outcomes are anyone's guess. However, that hasn't stopped several from speculating. Some say that the investigations will force industry leaders like Monsanto, Dean Foods, or maybe even livestock giant JBS, to substantially change the way they do business. Skeptics say it will be a public relations ploy, demonstrating concern and generating millions in fees for lawyers, economists and P.R. firms, without actually finding any evidence that can lead to a court case. Others worry about yet another potential outcome: that the whole process will have a chilling effect on much-needed investments in agricultural research---putting U.S. farmers and ranchers at a competitive disadvantage compared to their global counterparts.

Not surprisingly, those concerned about industry consolidation applauded the move. Sens. Russ Feingold, (D-WI), Chuck Schumer, (D-NY), and Bernie Sanders, (I-VT), wrote to Justice to welcome its "focused and aggressive approach to competition and antitrust issues . . . after years of inaction." In a more competitive industry, they say, "farmers would have greater options as to where they sell their product and would see higher prices on the farm, while consumers would see more competitive prices in the store." Sanders, said later that the USDA-DOJ workshops will be an opportunity "**to tell the federal government the disastrous impact agricultural consolidation has had on their industries and their livelihoods.**"

"By bringing these workshops out into the heartland, the Obama Administration is providing a solution-oriented process by which **we may arrive at reasonable and appropriate solutions to antitrust issues that have plagued our markets for decades,**" said Jon Wooster, U.S. Cattlemen's Association President.

The Organization for Competitive Markets, hailed the DOJ/USDA announcement as a sign that their prayers had finally been answered.

"For the past forty years or so, the courts and government have not been the farmer and rancher's friend. Their decisions have clearly favored big business interests, wrote OCM Executive Director Fred Stokes in his association's newsletter. "However, I believe there is now reason for hope," he emphasized, noting that the key agencies seem to be "sympathetic to our situation and posed for constructive action."

What would 'constructive action' look like? The folks at DOJ aren't saying. Deputy Assistant Attorney General for the Antitrust Division Philip Weiser spoke to OCM members in August and outlined the history of the relevant law and the agency's past antitrust enforcement actions, dating back 120 years ago when the Sherman Anti-Trust Act was put in place. Weiser also noted that, "over the last 20 years, changes in technology and the marketplace have revolutionized agriculture markets, producing substantial efficiencies."

And therein lies the catch for many who want to break up big agribusinesses or lessen their market dominance. Antitrust regulations exist to protect competition for the benefit of consumers. If those same companies can prove additional consumer benefits without keeping others out of the marketplace, can they be found guilty of anti-trust violations?

Earlier this year, the Government Accountability Office released a study concluding that food industry concentration does not appear responsible either for rising food prices or declining farm prices. GAO's report was prepared at the request of two other long-time critics of consolidation – Sens. Herb Kohl, D-WI., who has focused on the dairy industry, and Charles Grassley, R-Iowa, who has been a sharp critic of beef and pork industry consolidation. To read GAO's report on food prices and concentration:

<http://www.gao.gov/products/GAO-09-746R>

For their part, DOJ officials say they intend to collect all comments and see where the process leads

"We are approaching the upcoming workshops without any preconceptions and cannot promise any particular answers or results," emphasizes Weiser. "I can assure you, however, that we are committed to a careful examination of the marketplace."

Seed industry test

Monsanto has made no secret of the fact that the Department of Justice (DOJ) has asked them for information relative to competition in the seed industry, especially issues raised by the firm's rival, Dupont's Pioneer Hi-Bred seed unit. The department also plans to look at the meat and poultry industry and market transparency – examining concerns that marketing has shifted from organized exchanges to greater reliance on vertical integration and contracts. But so far, no subpoenas have been issued or lawsuits filed by the government.

The DOJ/USDA workshops could be used, in part, to build a public record and demonstrate that competition issues impact more than just “a bunch of activists,” says Peter Carstensen, a former Justice Department lawyer who teaches antitrust law at the University of Wisconsin Law School. “The more press you get is a way of indirectly educating the public, as well as judges.” Carstensen says he would not be surprised to see DOJ bring a lawsuit early next spring or summer against Monsanto, involving how the firm uses licensing agreements on their patented traits to place even further restrictions on what licensees can and cannot combine with those patented traits.

Historically, Carstensen says the U.S. Department of Commerce (DOC) has taken a very broad view of what should be protected by patent law, in contrast to what DOJ may see as much-needed restraints. He anticipates that DOC will be asking DOJ not to restrict Monsanto’s current ability to control how their traits are used by licensees, potentially leading to a tug of war within the Obama Administration.

Why would any business, whether it’s a start-up looking for venture capital or an established firm like Monsanto, spending millions of dollars on research, want to continue to stay in agriculture if they can’t protect their investments with patents? Carstensen says the debate cuts two ways. You need to protect investments but at the same time, one of the biggest inhibitors to new investment is existing firms that restrict large shares of the market.

“It’s a delicate dance and we need to make sure that we have patent protection that provides a sufficiently robust system for investors,” he explains.

Renewed focus on these questions has prompted a new lobbying storm on Capitol Hill, as organizations and companies try to rally support for their particular points of view. The seed industry provides one case in point: Monsanto meets regularly with industry leaders, trying to explain the investments they have made—often while other firms were unwilling to do so—and the resulting benefits they bring to the marketplace. Representatives from DuPont also hold regular meetings with industry groups, but recently briefed major farm organizations on what they describe as the seed industry in general and what they view as Monsanto’s monopoly hold on the marketplace--- as a preview to the upcoming workshops. The DOJ is accepting written comments by Dec. 31 and is expected to consider those who submit comments as possible participants in the workshops next year.

Monsanto and Pioneer have long been at loggerheads over a variety of issues related to seed genetics and sued each other earlier this summer. In May, Monsanto filed a patent-infringement lawsuit, aimed at forcing DuPont's Pioneer Hi-Bred seed business to dismantle an herbicide-resistant soybean plant that DuPont hopes to begin selling to farmers in 2011. One month later, DuPont's Pioneer unit filed a countersuit against Monsanto, contending it had breached its license to market Roundup Ready soybean and corn seeds that are modified to be more tolerant of herbicides. In a statement, DuPont said it is allowed to combine, or "stack," the genetic traits of its Optimum GAT technology with Roundup Ready under its rights in a licensing agreement with Monsanto, and that Monsanto's patents around its soybean traits were invalid. The case is now in federal court.

Today, the vast majority of the nation's corn and soybeans grow from seeds genetically altered according to Monsanto patents, followed by DuPont’s Pioneer Hi-Bred seed business and Syngenta Seeds. Monsanto is the largest seed company in the world, controlling 95% of the

market for insect and herbicide resistant cotton traits, according to a [whitepaper](#) by American Antitrust Institute's vice president and senior fellow, Diana Moss. In 2008, Monsanto had shares of up to 65% for traited corn and soybeans and about 45% for traited corn. During the late 1990s and through the 2000s, Monsanto acquired almost 40 companies "creating the horizontal and vertical integration that underlies the firm's platforms in cotton, corn, and soybeans," notes Moss. Most of the acquisitions were seed companies. (To see a chart indicating which major companies use which traits, go to www.Agri-Pulse.com)

But third party market data indicates that **being big is no guarantee a company will stay on top**. From 1998 to 2008, Pioneer enjoyed the highest market share in corn, eventually losing 10 points. In that same period, smaller independent seed companies gained 10 points of corn market share. For soybeans during that same period, Pioneer added about 10 points of market share.

Speaking to investors in September, Paul Schickler, DuPont President, Pioneer Hi-Bred, explained that the firm is now gaining share in both corn and soybeans.

" . . . we are especially proud about the market share gains that we achieved in 2009 through the Pioneer brand, in excess of a 1-point market share gain in corn and also in the Pioneer brand for soybeans, a 2-point share gain. But then complementing that gain in the Pioneer brand is our PROaccess distribution system, basically adding one point of share gain to both corn and soy for Pioneer. So overall, in excess of a 2-point share gain for Pioneer corn and a 3-point share gain for Pioneer soybean, in combination with in excess of a 20% price increase for corn and in excess of a 35% price increase for soybeans. Truly a significant achievement in 2009."

The Department of Justice and USDA are also asking for written comments in both paper and electronic form to the DOJ no later than Dec. 31, 2009. DOJ sources say they will read all of the comments before considering who will be invited to testify at each respective workshop. All comments received will be publicly posted. Two paper copies should be addressed to the Legal Policy Section, Antitrust Division, U.S. Department of Justice, 450 5th Street, NW, Suite 11700, Washington, D.C. 20001. The electronic version of each comment should be submitted to agriculturalworkshops@usdoj.gov.

With an investigation of this scope, the stakes are high for seed companies vying for market share. But they may be even higher for farmers who rely heavily on private companies to invest in new technologies that can produce higher yields, withstand climate and insect challenges and produce the types of nutrients needed to feed an increasingly hungry world.

Corn Traits Licensed by Dow

	BASF	Bayer	Dow AgroSciences		Monsanto		Syngenta				
Trait Choices (including conventional)	Herbicide tolerant--imidazolinone	Herbicide tolerant --glufosinate	Rootworm resistant	Corn borer resistant	Rootworm resistant	Corn borer resistant	Herbicide tolerant--glyphosate	Herbicide tolerant --glyphosate	Rootworm resistant	Corn borer resistant	Number of trait providers contributing to this product
Herculex I-LL											2
Herculex I-LL-IMI											3
Herculex I-LL-RR2											3
Herculex RW-LL											2
Herculex RW-LL-RR2											3
Herculex XTRA-LL											2
Herculex XTRA-LL-RR2											3

Corn Traits Licensed from Monsanto

	BASF	Bayer	Dow AgroSciences	Monsanto		Syngenta					
Trait Choices (including conventional)	Herbicide tolerant-- imidazolinone	Herbicide tolerant -- glufosinate	Rootworm resistant	Corn borer resistant	Rootworm resistant	Corn borer resistant	Herbicide tolerant-- glyphosate	Herbicide tolerant -- glyphosate	Rootworm resistant	Corn borer resistant	Number of trait providers contributing to this
RR2											
YGCB											
YGCB-IMI											2
YGCB-RR2											
YGPlus											
YGPlus-IMI											2
YGPlus-RR2											
YGRW											
YGRW-RR2											
YGVT RW-RR2											
YGVT3											
YGVT3 Pro											
SmartStax											3

Corn Traits Licensed from Bayer and BASF

	BASF	Bayer	Dow AgroSciences	Monsanto			Syngenta				
Trait Choices (including conventional)	Herbicide tolerant-- imidazolinone	Herbicide tolerant -- glufosinate	Rootworm resistant	Corn borer resistant	Rootworm resistant	Corn borer resistant	Herbicide tolerant-- glyphosate	Herbicide tolerant -- glyphosate	Rootworm resistant	Corn borer resistant	Number of trait providers contributing to this product
IMI											
LL											

Herbicide tolerant traits for soybeans

Trait Choices (including conventional)	Bayer	DuPont	Monsanto	Number of trait providers contributing to this product
LL				
RR				
RR2Y				
RR-ST5				2
STS				