



December 31, 2009

Legal Policy Section  
Antitrust Division  
U.S. Department of Justice  
450 5th Street, NW, Suite 11700  
Washington, DC 20001

***Via Electronic Delivery***

**Subject:       Comments Regarding Agriculture and Antitrust Enforcement Issues  
                  in Our 21st Century Economy**

The American Antitrust Institute (AAI) is pleased to submit the two electronically-attached documents as part of the U.S. Department of Justice (DOJ) Antitrust Division's request for comments in the above-mentioned proceeding. The first is the AAI White Paper titled *Transgenic Seed Platforms: Competition Between a Rock and a Hard Place?* The second document, *Fighting Food Inflation Through Competition*, is a chapter from the AAI's 2008 report THE NEXT ANTITRUST AGENDA.

Both of the attached documents highlight the major competitive issues that trouble various agricultural sectors in the United States, including seed, meat, dairy, and poultry. The AAI commends the DOJ for initiating the series of workshops in 2010 to gather first-hand information and testimonials from market participants in order to develop a record of market conditions and practices that impair competition and harm consumers. This effort is an important parallel path to the DOJ's formal investigative actions.

Agriculture is enormously important to the U.S. economy. For this reason, competitive problems take on even more significance. This is not only because of adverse competitive effects, but because anticompetitive market conditions and practices threaten the stability and security of a key domestic supply chain. Agricultural security is--to a large extent--a matter of national security and therefore deserves particularly close scrutiny.

Among the many themes highlighted in the attached AAI documents is the abuse of patent rights to potentially stifle competition. This is a threshold issue in both agriculture and other key industries such as pharmaceuticals. Unfortunately, it is one that is not well-settled by the courts and which is complicated by excessively lenient patenting policies of the U.S. Patent and Trademark Office.

As discussed in the attached White Paper about transgenic seed, the AAI notes that a single firm with control of an enormous stock of patented technology serves as gatekeeper for rivals seeking the "access" necessary for competition. Monsanto's role as gatekeeper in the transgenic seed industry may well have resulted from the firm's alleged abuse of its patent rights. Such conduct, if proven, is detrimental to both competitors and consumers and is manifested in higher prices, lower quality, less choice, and less innovation.

To its credit, the DOJ has recognized the importance of reining in excessively restrictive practices involving the use of patented technologies to remedy competitive problems in at least two major merger cases—Monsanto’s acquisitions of DeKalb (corn) in 1998 and of Delta and PineLand (cotton) in 2007. The AAI encourages the DOJ to again attack this issue head-on to address Monsanto’s dominance in transgenic seed and to answer the critical question of what constitutes the abuse--versus legitimate use--of patent rights. In the AAI’s view, such abuse results from earning monopoly profits on the basis of asserted patent rights outside the scope of an invention. Examples of potentially anticompetitive practices include stacking restrictions (i.e., prohibiting the stacking of one genetic trait with a rival’s genetic trait) and selective licensing of traits.

The question of abuse versus legitimate use of patented technology highlights the tension between the roles of patent law (in promoting innovation) and antitrust law (in protecting competition, which includes protecting the potential for innovation). Resolving this question is a difficult task, but clarity and guidance is needed now more than ever before.

The AAI submissions address other developments in, and features of, agricultural sectors that have led to undue concentration, anticompetitive practices, and adverse effects on consumers. We would be pleased to discuss the issues in more detail with the DOJ Antitrust Division’s staff and leadership and look forward to the discourse at the workshops.

Sincerely,

A handwritten signature in black ink that reads "Diana L. Moss". The signature is written in a cursive, flowing style.

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