



GM In the Dock

US courts step in where safety regulators fail

Briefing II in a series: Monsanto and the monopoly investigators

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Since GM crops were introduced regulators have been accused, including by the USDA Inspector General, of failing to protect people, the environment and the economy from the dangers of the technology.ⁱ

The public is routinely assured that GM food and crops are “substantially equivalent” to their conventionally bred counterparts and that biotech companies and products have been rigorously examined for safety during authorisations.

Along side these assurances runs an argument that the EU’s reluctance to embrace the technology is both missing out on its benefits and holding back developing countries in acquiring the technology.

Recent developments in the US courts highlight the flaws in all of these arguments. Judges are taking regulators to task for not doing their job.ⁱⁱ Juries are ordering biotech companies to pay millions in compensation and punitive damages to farmers in the first of thousands of pending cases over just one contamination incident. The US Department of Justice has opened an anti-trust investigation of, among other things, Monsanto’s practices.

This briefing highlights the details of the ongoing anti-trust investigation launched by the US Department of Justice about corporate concentration in agribusiness, including the seed sector. It demonstrates both how far the industry will go to protect itself against the public interest and why the EU is prudent in declining to trust the GM industry about the safety of its products before strict, enforceable liability measures are in place to hold them to account for any damage they cause. We focus on Monsanto’s role in the investigation because of their dominance in the market and their stated aims to continue or expand this position.ⁱⁱⁱ

Ever increasing market power

Since Monsanto’s Roundup Ready GM trait (RR) was first launched in 1996 it has rocketed its way into 93% of US soybeans and 82% of US corn in 2009.^{iv} These are crops of immeasurable importance to the agrifood industry. Products like oil, lecithin, starch and syrup derived from them are present in the vast majority of processed foods available in US supermarkets. With such a huge market it is not surprising that Monsanto selected these crops to be among the first to be genetically engineered.

Stories have circulated for years about Monsanto’s vigorous “protection” of their patents, including using Pinkerton agents to watch farmers and the pursuit of lengthy exemplary court cases when their genes are found on farms that had never grown GM crops.^v As Monsanto’s share of the seed and herbicide markets have grown, concern about the company’s approach to business and competitors has, too.

Seed prices

Monsanto’s dominance means US farmers are virtually a guaranteed market for them. This leads to other problems. For example, a report by the Farmer-to-Farmer campaign says that corn seeds prices were hiked from US\$110/bag in 1999 to around of US\$190/bag by 2008, and soya seed prices more than doubled to over US\$40/bag. Most of these costs are attributable to Monsanto’s “technology fee” charged on every seed with their GM traits. The Farmer-to-Farmer campaign report this fee on soya has tripled since 2000:

“This means a farmer who plants one bag of Roundup Ready soybeans per acre on 1,000 acres of soybeans has seen his production costs rise by US\$11,000 in five years due to the trait price increase alone.”^{vi}

Monsanto posted financial returns for the 2009 financial year of US\$11.7 billion in net sales leading to income (profit) of US\$2.1 billion.^{vii} Some \$7.3 billion of sales came from GM seeds and licensing genes to other companies.^{viii}

Seed companies justify the price rises by saying they are due to the costs of developing technologies that help farmers boost yields. A Monsanto representative said, “We’ve invested millions and billions of dollars into creating new seed technology for farmers that enable them to basically get a greater profit off their farm.”^{ix}

Despite these investments, soya yields have only risen by less than 1% in the past decade.^x To make matters worse, GM soya shows a yield “drag” (loss) of up to 10% on conventional varieties.^{xi} Coupled with the increasing costs of inputs to control the growing problem of weed resistance, farmers are finding it hard to justify paying more to get less than they were promised.

Rounding up profits

In addition to rising seed prices, farmers also struggle under the hikes Monsanto has put on the herbicide Roundup, which they are contractually obliged to use when they use Monsanto GM seed or lose rights. The company has been criticised for repeated price increases on Roundup, which more than doubled during 2008. They say they need to ration the supply to reduce “incidental use”, arguing perversely that higher prices show they are “taking care” of farmers: “We wanted to take care of our Roundup Ready crop growers. They've made a commitment by spending money for technology fees, and we want to make sure they have the product they need”.^{xii}

Generic glyphosate (the active ingredient in Roundup) is available now that the global patents have expired. One of the main rationales for Roundup Ready crops was to ensure Monsanto has a continued market for their best selling herbicide post patents. However, the company is now seeking to gain further market share in Brazil by pressing the government to introduce a tax on the import of approved Chinese manufactured glyphosate that is undercutting its prices outside the GM market.^{xiii}

Restricting research

Patents on GM seed are also used to prevent independent scientific research^{xiv} to the point that field scientists have to avoid monitoring GM crops to protect farmers from being accused of breaching sales contracts, which specifically exclude the seeds being used for research.^{xv} This is bad both for farmers (who could miss out on benefits stemming from such research) and for public safety (as authorisations have been based on Monsanto's own data, which are being challenged by independent analysis of assurances of safety^{xvi and xvii}).

The previous tradition of public universities developing new traits and making them available to seed companies to breed into seed lines for sale has effectively been halted by Monsanto's contracts preventing breeders (including public institutions funded by taxpayers)^{xviii} mixing Monsanto traits into new lines without explicit consent.

They then restricted independent investigation of their products' performance and safety. Biotech companies require researchers to sign contracts stipulating they have the right to review, and veto, research before it is published. This measure of control linked to the funding they give research bodies and academic institutions, enables the biotech industry to effectively prevent negative findings coming to light, which also makes it impossible to tell how many studies are repressed in this way.^{xix} Scientists who have raised concerns about GM crop safety have often been subjected to personal attack about the quality of their work and integrity.^{xx}

As the *Times* reported:

“The problem is that government funding for independent research on GMOs is scant—and industry funding is non-existent. And it's extremely difficult for independent researchers to get their hands on GMO seeds without signing restrictive contracts with their patent holders.”^{xxi}

Biotech companies also use their funding to shape research agendas and steer them away from projects that might make uncomfortable revelations. As the American Anti-trust Institute puts it:

“With high market concentration comes more control – not only over technology – but information. It is well known, for example, that over time agricultural biotechnology firms have exerted more control over field trials performed at research institutions (eg, land-grant universities). Trials are generally performed with company approval and direct comparisons between transgenic seed platforms or between transgenic and conventional platforms are scarce.”^{xxii}

As a Monsanto spokesperson points out, “Please also keep in mind that, as the (intellectual property developer), it is our right to determine who will obtain rights to our technology and for what purpose.”^{xxiii}

Consolidation of choice

To close the loop and secure their position, Monsanto also undertook a thorough campaign to buy up seed companies, remove competing varieties from the market and effectively leaving their customers but with no other choice.

In December 2009 leaked confidential commercial licensing agreements revealed just how Monsanto pressurised competitors and smaller seed companies by using its dominance to control the possibility of other biotech companies distributing their products.^{xxiv} Contractual provisions include:

- a requirement that if a seed company changes ownership it must first destroy all inventory containing Monsanto's traits, effectively both removing much of the value of the company (ie, making it unsalable) and facilitating Monsanto buying up companies wanting to sell up. A lawyer representing DuPont says this prohibited his company and others from bidding against Monsanto when it snapped up two dozen smaller seed companies over the last five years. A Monsanto spokesperson says, "Simply put, it was designed to facilitate early adoption of the technology."
- heavy discounts for companies guaranteeing that Monsanto products will make up at least 70% of their corn seed inventory (7.5% of the royalty it pays Monsanto if Roundup Ready accounts for 70% of the dealer's annual herbicide-resistant seed sales, with the rebate halved if the Roundup Ready share is between 50% percent and 75% and not paid at all below 50%) facilitating the rapid roll out of new Monsanto lines in what was called a "scorched earth campaign" by Syngenta in their 2004 lawsuit.^{xxv}
- a prohibition on discussing terms of such contracts, giving Monsanto the right to cancel contracts for violations. Fear of these provisions prevents even companies who don't sign them from providing information to others for fear Monsanto will sue for breach of confidentiality.
- rebates to seed dealer s/he developed a plan to move customers to Roundup Ready 2 products from Roundup Ready, the patent on which will expire in 2014.^{xxvi}

The situation is plain: the market is increasingly dominated by fewer and fewer players. According to the Illinois Farm Bureau four seed companies (one of them Monsanto) now control 75% of the market.^{xxvii}

Political inputs

For good measure, Monsanto also pays careful attention to its political position. It contributed US\$386,325 to political campaigns alone in the 2008 calendar year saying, "Monsanto is committed to participating constructively in the political process, as such participation is essential to the Company's long-term success."^{xxviii} The company spends millions more on lobbying – over US\$8 million in both 2008 and 2009, and over US\$2 million in the fourth quarter of 2009.^{xxix}

Monsanto also benefits from a number of key appointments within the US administration. The Obama administration alone has so far made appointments including:

- ex-Monsanto employees on his science advisory panel.
- Monsanto's ex-Vice President for Public Affairs now at the FDA.
- Vice President for science and regulatory affairs at CropLife America (an industry coalition including Syngenta, Monsanto, Dow Chemical and DuPont) now chief US agriculture trade negotiator.
- Roger Beachy, whose Monsanto-funded research led to the first GM tomato, as the first director of a new federal National Institute of Food and Agriculture, responsible for awarding and estimated US\$700 million research grants. (NIFA's creation was at the recommendation of a task force lead by the Chairman of the Danforth Center^{xxx}, itself a creation of Monsanto).^{xxxi}
- Elena Kagan as Supreme Court Justice. In her current role as Solicitor General Ms Kagan submitted two briefs to the Supreme Court supporting Monsanto's position, apparently on behalf of the US Government. She is listed in Court documents as acting as attorney for "Federal Respondents in support of Petitioners" – the petitioners in this case are Monsanto.^{xxxii}

Such behaviour has attracted attention.

Anti Trust Investigations in the US

In August 2009 the US Departments of Agriculture and Justice announced a series of five nationwide "workshops" querying consolidation and competition in the agriculture industry, particularly meat, poultry, dairy and seed sales.

Of particular interest, however, is Monsanto, including their business practice and the repercussions of the controversial 2007 decision by the Justice Department that Monsanto would be allowed to purchase rival seed company Delta and Pine if it divested of other business interests, including a cottonseed company.^{xxxiii} They company was at that time also required to permit other cottonseed companies to combine Monsanto traits into other company's seed lines.^{xxxiv}

By October 2009 Monsanto confirmed it had complied with “informal” requests from the US Department of Justice for interviews and documents.^{xxxv}

It was by then widely believed, however, that the agency had joined two states (Iowa and Texas)^{xxxvi} in undertaking an anti-trust investigation of Monsanto’s business practices.

By December, Monsanto had signed on an Iowa lawyer and strategist (who has also donated US\$150,000 to Obama’s new USDA boss Tom Vilsak) as a federal lobbyist to represent the company on competition/antitrust, environmental law, regulations and policies.^{xxxvii}

Former Presidential candidate and Iowa Governor Vilsack is a vocal supporter of GM, pharma and bio-ethanol crops. He is the founder and former Chair of the Governor’s Biotechnology Partnership and was named 2001 Governor of the Year by biotechnology’s biggest industry group The Biotechnology Industry Organisation.^{xxxviii} He also oversaw the introduction of restrictions on local government’s ability to regulate where GM crops may and may not be grown.

By March 2010 seven states (including Vilsack’s former Governorship Iowa) had initiated anti-trust investigations against Monsanto to determine if the company violated the law with its rebate and incentives to exclude rivals’ products from the market, limiting deployment of its technology into other company’s products and so on. Five of the states (Texas, Iowa, Ohio, Illinois and Virginia) account for some 39% of US corn and soya worth US\$31 billion. Monsanto said the allegations of market abuse were “unfounded” and that the company “is in fact pro-competitive”, pointing out that they have provided “millions of pages of documents”.^{xxxix}

The deputy assistant attorney general in the Department of Justice’s Antitrust Division said:

“In studying this market, we will evaluate the emerging industry structure, explore whether new entrants are able to introduce innovation, and examine any practices that potentially threaten competition.”^{xl}

Monsanto’s political supporters caution that the anti-trust work could “chill innovation”.

On the eve of the first Justice Department workshop, more than 250 people attended a town hall meeting in Iowa urging them to “bust up big ag”.^{xli}

That workshop was standing room only, attended by around 800 people.^{xlii} American Antitrust Institute Vice President Diana Moss described what she called the “illusion of choice” in Monsanto’s dominance of the seed industry.^{xliii} Indeed they compare the seed monopoly with the situation in the IT industry in 2001:

“They bear a strong resemblance to those found in the government’s Section 2 cases against AT&T in 1982 and Microsoft in 2001. The fact that monopolization often afflicts industries where consumers stand to benefit substantially from innovation deserves special attention. The potential severity of monopolization concerns is compounded by the fact that transgenic seed, like telecommunications services and personal computing software, is ubiquitous. Higher prices, limited choice, and slower rates of innovation that result from anticompetitive conduct affect the daily lives, productivity, and well-being of a substantial base of consumers. In agriculture, there is an additional argument to be made for competition, in that it creates diversity and stability in a critically important supply chain.”^{xliv}

Mr Vilsak said, “Rural America has been in recession much longer than the rest of the country,” adding the workshop “is about rural America, and what can be done to stop its decline.”^{xlv}

Monsanto maintains, “Farmers choose these products because of the value they deliver on farm,” and that questions about such a dominant market position are normal.^{xlvi}

The Department of Justice anti-trust investigation continues.

Meanwhile the state of West Virginia has launched a consumer fraud case against Monsanto for claiming its new Roundup Ready 2 GM soybeans increase yields, citing Iowa State University, Pennsylvania State University and investment researcher OTR Global all finding RR2 seeds failed to live up to Monsanto’s promises despite the high price paid by farmers.^{xlvii}

Notes

- ⁱ "However, the EFSA GMO panel has failed to conduct a rigorous assessment of the data provided by companies and, in most cases, has even ignored some of the EU legal requirements on risk evaluation of GMOs." www.greenpeace.org/raw/content/eu-unit/press-centre/policy-papers-briefings/EFSA-RA.pdf
and US Department of Agriculture Office of Inspector General, *Audit Report: Animal and Plant Health Inspection Service Controls Over Issuance of Genetically Engineered Organism Release Permits*, (Dec. 2005), www.usda.gov/oig/webdocs/50601-08-TE.pdf
and Rebecca Bratspies, *Some Thoughts On the American Approach to Regulating Genetically Modified Organisms*, 16 Kan.J.Law & Public Policy 393, 415-18 (2007)
and <http://gmo-journal.com/index.php/2010/01/28/internal-report-finds-usdas-failure-to-effectively-regulate-gmos/>
and www.non-gmoreport.com/articles/feb10/usda_gm_alfalfa_threatens_organic_industry.php.
- ⁱⁱ See GM Freeze briefing *GM In the Dock: US courts step in where safety regulators fail*, Briefing I in a series: Courts check spread of GM alfalfa and beet
- ⁱⁱⁱ See www.ft.com/cms/s/0/65af86dc-4278-11df-8c60-00144feabdc0.html Monsanto Chief Executive Hugh Grant "said the company would deliver 13-17 per cent growth in the coming years", despite having to revise targets to double profits by 2012 from 2007 levels.
- ^{iv} See www.businessweek.com/news/2010-03-10/monsanto-7-state-probe-threatens-profit-from-93-soybean-share.html.
- ^v See www.mit.edu/~thistle/v13/4/food.html
and www.hort.purdue.edu/newcrop/proceedings1999/v4-124.html
and www.twinside.org.sg/title/odds.htm.
- ^{vi} See www.grist.org/article/2009-12-15-seed-behemoth-monsanto-stumbles-into-antitrust-trouble/.
- ^{vii} See www.monsanto.com/investors/financial_reports/annual_report/2009/financial_highlights.asp.
- ^{viii} See www.businessweek.com/news/2010-03-10/monsanto-7-state-probe-threatens-profit-from-93-soybean-share.html.
- ^{ix} See <http://news.medill.northwestern.edu/chicago/news.aspx?id=161289>.
- ^x See <http://news.medill.northwestern.edu/chicago/news.aspx?id=161289>.
- ^{xi} Benbrook, C.M. (1999) Evidence of the magnitude and consequences of the Roundup Ready soybean yield drag from university-based varietal trials in 1998, Ag BioTech InfoNet Technical Paper Number 1, http://www.biotech-info.net/RR_yield_drag_98.pdf.
- ^{xii} See http://deltafarmpress.com/mag/farming_monsanto_explains_reasons/.
- ^{xiii} See www.bloomberg.com/apps/news?pid=20601086&sid=ap9qX1Co5k5l.
- ^{xiv} Pollack A, 2009. "Crop Scientists Say Biotechnology Seed Companies Are Thwarting Research" *NY Times* 09 February 2009 and www.nytimes.com/2009/02/20/business/20crop.html.
- ^{xv} See Monsanto specimen technology agreement 2008 http://www.monsanto.com/pdf/seedpatentprotection/tug_sample.pdf
- ^{xvi} See www.gmfreeze.org/uploads/D8C_sereralini_long_doc_final.pdf.
- ^{xvii} de Vendômois JS, Roullier F, Cellier D, Séralini GE, 2009. A Comparison of the Effects of Three GM Corn Varieties on Mammalian Health. *Int J Biol Sci* 2009; 5:706-726. Available from <http://www.biolsci.org/v05p0706.htm>
- ^{xviii} See www.guardian.co.uk/world/feedarticle/8855597.
- ^{xix} See www.e360.yale.edu/content/feature.msp?id=2273
and www.scientificamerican.com/article.cfm?id=do-seed-companies-control-gm-crop-research
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www.gmwatc.org/component/content/article/11573-gm-industrys-strong-arm-tactics-with-researchers-nature-biotechnology-
- ^{xx} Ensser, 2009, see www.ensser.org/uploads/media/AnnexSupportSereralini-et-al.pdf.
- ^{xxi} See www.nytimes.com/2009/02/20/business/20crop.html?_r=1.
- ^{xxii} See www.antitrustinstitute.org/archives/files/AAI%20White%20Paper%20on%20Seed_010820101056.pdf
- ^{xxiii} See www.guardian.co.uk/world/feedarticle/8855597.
- ^{xxiv} See www.guardian.co.uk/world/feedarticle/8855597.
- ^{xxv} See www.businessweek.com/news/2010-03-10/monsanto-7-state-probe-threatens-profit-from-93-soybean-share.html.
- ^{xxvi} See www.businessweek.com/news/2010-03-10/monsanto-7-state-probe-threatens-profit-from-93-soybean-share.html.
- ^{xxvii} See www.olneydaily.com/news/x1991993902/Study-of-seed-issue-draws-plenty-of-interest.
- ^{xxviii} See www.monsanto.com/responsibility/corp_gov/disclosures.asp
and www.monsanto.com/pdf/responsibility/2008_disclosure.pdf.
- ^{xxix} See www.opensecrets.org/lobby/clientsum.php?iname=Monsanto+Co&year=2008
and www.soyatech.com/news_story.php?id=17867.
- ^{xxx} See <http://stlouis.bizjournals.com/stlouis/stories/2009/09/21/daily53.html>.
- ^{xxxi} See www.danforthcenter.org/birthdayparty/legacy.htm: "The Danforth Center was founded in 1998 through a \$60 million gift from the Danforth Foundation, a \$50 million gift from the Monsanto Fund, the donation of \$12 million in land from Monsanto Company, and \$25 million in tax credits from the State of Missouri."
- ^{xxxii} See www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-475.htm.
- ^{xxxiii} See http://online.wsj.com/article/SB10001424052748704882404574461671425452270.html?mod=WSJ_hpp_MIDDLETopStories.
- ^{xxxiv} See www.stltoday.com/stltoday/business/stories.nsf/story/F8FECB0CF5402F588625764A000B8283?OpenDocument.
- ^{xxxv} See www.stltoday.com/stltoday/business/stories.nsf/story/F8FECB0CF5402F588625764A000B8283?OpenDocument.
- ^{xxxvi} See www.soyatech.com/news_story.php?id=15784.
- ^{xxxvii} See <http://iowaindependent.com/22980/iowa-law-firm-files-as-monsanto-lobbyist-in-advance-of-ag-antitrust-workshop>.
- ^{xxxviii} See www.organicconsumers.org/articles/article_16156.cfm
and www.latimes.com/news/politics/la-na-vilsack17-2008dec17_0_2833044_story.
- ^{xxxix} See www.businessweek.com/news/2010-03-10/monsanto-7-state-probe-threatens-profit-from-93-soybean-share.html.
- ^{xl} See <http://iowaindependent.com/22980/iowa-law-firm-files-as-monsanto-lobbyist-in-advance-of-ag-antitrust-workshop>.
- ^{xli} See www.reuters.com/article/idUKN1122982620100312?type=companyNews.
- ^{xlii} Personal communication with attendees.
- ^{xliii} See www.reuters.com/article/idUKTRE62B42O20100312?type=companyNews.
- ^{xliv} Moss DL, 2010. *The CPI Antitrust Journal* April 2010(2), see [www.antitrustinstitute.org/archives/files/Moss-APR10\(2\)_043020101412.pdf](http://www.antitrustinstitute.org/archives/files/Moss-APR10(2)_043020101412.pdf)
- ^{xlv} See www.desmoinesregister.com/article/20100312/BUSINESS01/100312015/1029/BUSINESS/Vilsack-Today-s-iowa-ag-workshops-%E2%80%98about-decline-of-rural-America-
- ^{xlvi} See www.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112802471.html.
- ^{xlvii} See www.bloomberg.com/news/2010-06-25/monsanto-claims-of-improved-soybean-yields-investigated-in-west-virginia.html