

share of Staley's profits is not quite 10% ((10% × 41.5%) + 5.76% = 9.91%).

Based on its investigation, the Department concluded that ADM's 16% stake in Tate & Lyle does not give ADM control or influence over Staley's business decisions, give ADM access to competitively sensitive information at Staley, or materially affect competition in more subtle ways; e.g., by realigning incentives so that ADM is less inclined to compete aggressively against Staley because of its share of Staley's profits. Department staff thus determined that ADM's ownership interest in Tate & Lyle (and Staley) does not support treating ADM's acquisition of MCP as a four to three rather than a five to four situation, and so there was no reason to mention that interest in the CIS.

3. The Seventh Circuit's Decision in the High Fructose Corn Syrup Litigation Is Consistent With the Department's Complaint

Professor Carstensen contends that the Department's CIS should have discussed the Seventh Circuit's decision in *In re High Fructose Corn Syrup Litig.*, 295 F.3d 651, 653–54 (7th Cir. 2002), cert. denied, 71 U.S.L.W. 3352 (U.S. Feb. 24, 2003) (No. 02–692), 71 U.S.L.W. 3353 (U.S. Feb. 24, 2003) (No. 02–705), 71 U.S.L.W. 3367 (U.S. Feb. 24, 2003) (No. 02–736). See, e.g., Professor Carstensen's Comment at 2. Professor Carstensen believes the decision is particularly relevant because it suggests to him that ADM should not be permitted to acquire MCP “without any other change in the structure” of the HFCS industry. See *id.* at 6–8.

Beyond what is said about how to decide summary judgment motions in antitrust cases, the HFCS decision suggests that the manufacturers of corn syrup and HFCS operate in concentrated markets under conditions that are conducive to coordinated interaction. The Department reached a similar conclusion and thus brought this case. That said, the Department had no reason, and certainly no obligation, to discuss the HFCS litigation in the CIS.

4. The Department Has Considered All Appropriate Forms of Relief

Professor Carstensen contends that the Department did not consider alternative remedies, including a remedy he proposes to dissolve the CPMCP joint venture, to divest ADM's interest in Tate & Lyle and to bar ADM's acquisition of MCP. Professor Carstensen would have the Department “increase [] the number of separate firms from 5 to 6,” see Professor Carstensen's Comment at 8, thereby increasing rather than preserving the

existing competition. This remedy is inappropriate—the purpose of an antitrust remedy is to restore or protect competition, but not to enhance it. See, e.g., *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972). Professor Carstensen's remedy is also inappropriate because it reaches beyond the Complaint. See *United States v. Microsoft Corp.*, 56 F.3d 1448, 1459 (D.C. Cir. 1995). By proposing this remedy, Professor Carstensen improperly invites the Court to restructure an industry without legal basis and to intrude on the Department's prosecutorial role. See *id.*

The Department did consider the only appropriate relief raised by Professor Carstensen, barring the acquisition. See CIS at 8. However, that relief would have required a full trial on the merits against the defendants. The Department concluded that the proposed Final Judgment would preserve the existence of five independent competitors, while avoiding the time, expense, and uncertainty of trial. *Id.*

5. The Department Considered the Impact of the Acquisition in the Ethanol Market

Professor Carstensen also has asserted that “this merger may create significant competitive issues” and that there is “a plausible basis for concern” in the ethanol market. See Professor Carstensen's Comment at 10–11 (emphasis added). He goes on to construct his own hypothetical case, and now demands that the Court evaluate the proposed Final Judgment against that case. *Id.* at 8–15. Under the principles of *Microsoft Corp.*, however, this demand is improper, for it too reaches far beyond the Complaint. See 56 F.3d at 1459. In any event, Department staff, in the course of its investigation, carefully considered the competitive implications of ADM's acquisition of MCP in the market for ethanol and found no evidence to support any credible theory of antitrust violation.

B. AAI's Comment

AAI's comment voices many of the same concerns expressed by Professor Carstensen, all of which were addressed supra.

C. C. LeRoy Deichman's Comment

C. LeRoy Deichman's principal concern appears to be the MCP manipulated the shareholder vote on ADM's acquisition of MCP. That concern, and Mr. Deichman's concern that MCP is being eliminated as a role model for other farmer cooperatives that might be interested in building their

own ethanol producing facilities, do not raise antitrust issues, and it is inappropriate for the Department to respond to them in this memorandum. Mr. Deichman's concerns that the acquisition may lead to higher prices in ethanol and sweetener markets raise antitrust issues that we have already addressed. In short, consumers would be forced to pay ethanol and sweetener prices above competitive levels only if the acquisition enable makers of these products to behave in a noncompetitive manner, and it is highly unlikely that the acquisition will have that effect. See sections IV.A.1. and 5. Finally, Mr. Deichman's concern about farm prices (which we take to mean corn prices) is unwarranted. Having carefully reviewed the facts, the Department found no reason to believe that the acquisition would have an adverse impact on competition in markets other than the corn syrup and HFCS markets alleged in the Complaint. Indeed, in addition to the five corn wet millers preserved as a result of the proposed Final Judgment, there exist many other alternative buyers of corn to whom farmers can sell their crops. Therefore, the acquisition is highly unlikely to give corn wet millers monopsony power to depress the prices they pay farmers for corn.

Conclusion

The Competitive Impact Statement and this Response to Comments demonstrate that the proposed Final Judgment serves the public interest. Accordingly, after publication of the Response in the **Federal Register** pursuant to 15 U.S.C. 16(b), the United States will move this Court to enter the Final Judgment.

Dated this 1st day of April, 2003.

Michael P. Harmonis, Jessica K. Delbaum,
Attorneys; United States Department of
Justice, Antitrust Division, 325 7th Street,
NW., Suite 500, Washington, DC 20530. (202)
307–6371.

Certificate of Service

I hereby certify that on this 1st day of April, 2003, I have caused a copy of the foregoing Response of the United States to Public Comments on the Proposed Final Judgment and the attached Appendix to be served by first class mail, postage prepaid, and by facsimile on counsel for defendants in this manner:

David James Smith, Vice President,
Secretary & General Counsel, Archer-
Daniels-Midland Company, 4666
Faries Parkway, Decatur, IL 62526.
Telephone: (217) 424–6183.
Facsimile: (217) 424–6196. Counsel