

Commission & Greek EU presidency present false hope on GM crop bans Proposal for national bans does not stand up to legal scrutiny

On Monday 3 March, EU environment ministers will debate a draft law that the European Commission claims would give EU countries the right to ban GM crop cultivation on their territory, even if a crop has been approved at the EU level. The Commission originally proposed a draft in 2010, but concerns over its legal solidity have plagued it ever since. Now the Greek EU presidency has revived it after the Commission said it would approve a new pesticide-producing GM maize which was opposed by a record number of 19 countries on 11 February [1]. This briefing lays out the legal and political flaws of the Greek proposal as it stands.

Reports in the media say that France will also present a proposal that goes further in guaranteeing the right of EU countries to ban GM crops. It is as yet unclear whether France will make a formal submission to the meeting of environment ministers [2].

Legal flaws

The basis for Monday's ministerial debate is a new proposal submitted by the Greek EU presidency, which suffers from the same legal flaws as the text originally proposed by the Commission in 2010. Both proposals would not allow EU countries to restrict GM crop cultivation on their territory because of environmental and health concerns. Environmental risks would continue to be assessed at the EU level by the European Food Safety Authority (EFSA). EFSA has so far recommended the approval of every single GM crop it has assessed. It has come under fire for its links to the biotech industry [3].

Health and environmental protection are among the very few legal grounds that can limit the free movement of goods within the EU and its member states, as well as under World Trade Organisation rules. Commenting on the original Commission proposal, the Council legal service concluded that *"there would be strong doubts about the compatibility with the [EU] Treaties or with the ... [WTO] of any measures the Member States might adopt"* [4]. It also said that *"if it is genuinely the intention ... to grant more freedom to Member States, then it would be necessary to revise the harmonised mechanisms laid down by the Directive and the Regulation, rather than provide margins of flexibility which the Member States will hardly have the chance to make use of while respecting their Treaty based obligations"* [5]. The European Parliament's legal service has also questioned whether the proposal would stand up to legal scrutiny [6].

Greenpeace EU agriculture policy director Marco Contiero said: *"The Greek presidency proposal has feet of clay and would come tumbling down with a mere prod. It would expose countries that want to ban GM crops to legal challenges and force them to do deals with biotech lobbyists behind closed doors. A legally solid GM ban should be based on the environmental and health dangers linked to GM crops. Anything less would not stand up to legal scrutiny."*

In an attempt to respond to these concerns, the Greek proposal details (in recital 10) a list of grounds on which national bans could be based: *environmental policy objectives, land use, town and country planning, socio-economic impacts, and co-existence*. However, none of these grounds would provide EU countries with a legally solid justification to prohibit GM crop cultivation on their national territory. Any ban based on these grounds could be challenged in court by biotech companies.

Legally solid grounds should be based on concrete environmental risks and impacts (not merely environmental policy objectives) that are either complementary to those examined by EFSA or which have not been adequately assessed by EFSA. EU countries should also be allowed to adopt precautionary national bans in case of persisting scientific uncertainty over the safety of a GM crop or if there is a lack of data on potential negative impacts on the specific environment of an EU country. These are among the grounds that the European Parliament referred to in a vote on the Commission proposal in July 2011 [7]. It

said that a ban should be based on “*grounds relating to local or regional environmental impacts which might arise from the deliberate release or the placing on the market of [GM crops] and which are complementary to the environmental impacts examined during the scientific assessment of the impacts on the environment [by EFSA].*”

The inclusion of environmental grounds does not undermine the EU’s harmonised risk assessment. Instead, the use of such grounds would complement the EU assessment in cases where it is not exhaustive. EU countries are best equipped to investigate and judge the impacts of GM crop cultivation on different ecosystems on their territory. Art. 191 (2) of the EU Treaty explicitly requires that the environmental diversity in EU regions is taken into account before the application of measures affecting the environment [8].

In December 2008, the Council unanimously urged the Commission to fundamentally reform the EU’s GM crop risk assessment and EFSA [9] Among other recommendations, EU countries called on the Commission to carry out the following:

- take into account “*the characteristics of the specific geographical areas in which GM plants may be cultivated in accordance with existing legislation*”;
- revise “*EFSA guidelines on environmental risk assessment*”;
- include in the risk assessment “*detailed assessment of the long-term environmental effects*” of GM crops;
- develop criteria for field trials “*to assess the potential ecological effects of the GM plants in receiving environments*”;
- “*study the potential consequences for the environment of changes in the use of herbicides caused by herbicide-tolerant GM plants*”;

So far, none of these recommendations have been applied.

Governments and biotech companies as equals

Contrary to the original Commission proposal, the Greek Presidency’s amended proposal requires EU countries who want to ban GM crop cultivation on their territory to request that the biotech company applying for an authorisation “*adjust the geographical scope of its notification,*” in order to exclude the territory of that particular country from cultivation.

Therefore, EU countries would be required to strike deals with biotech companies behind closed doors, giving corporate lobbyists a formalised role in policy-making. This proposal raises serious questions about the political process surrounding GM crops since it treats governments and private companies as equals, taking scientific concerns out of the equation altogether.

Notes:

[1] <http://www.greenpeace.org/eu-unit/en/News/2014/Record-number-of-EU-countries-opposes-Commission-plan-to-allow-pesticide-producing-GM-maize/>

[2] <http://www.bfmtv.com/economie/ogm-france-veut-renationaliser-autorisations-culture-713212.html>

[3] <http://corporateeurope.org/agribusiness/efsa>

[4] Council of the European Union, 5 November 2010, *Opinion of the Legal Service, 15696/10, Interinstitutional File: 2010/0208*. Regarding the validity of environmental grounds under WTO-law, the Council legal service noted that “*if a WTO Panel were persuaded by a complaining party that GM and non-GM seeds are in fact ‘alike’, the defence of national measures based on grounds which could be linked to the environmental protection exception in Article XX(g) of the GATT would be more likely to succeed than with other types of national measures.*”

[5] Council of the European Union, 5 November 2010, *Opinion of the Legal Service, 15696/10, Interinstitutional File: 2010/0208*.

[6] European Parliament, 17 November 2010, *Legal Service, SJ-0630/10*.

[7] <http://www.greenpeace.org/eu-unit/en/News/2011/European-Parliament-strengthens-draft-laws-to-ban-GM-crops/>

[8] Treaty on the functioning of the European Union, Article 191 (2): *“Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union.”*

[9] Council Conclusions on Genetically Modified Organisms, 4 December 2008, 16882/08.

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