

Wednesday 2 March 2011 from 14.30 to 17.30 hrs
European Parliament, Brussels - Room ASP 3E2

Legal Perspectives on the Internal Market and EU Importation

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EPP Group Hearing on **GMOs cultivation**
**Towards safe freedom of choice
for farmers and consumers?**

Chaired by Catherine Soullie MEP
With the participation of Commissioner John Dalli

Interpretation EN, FR, DE, IT, ES



For registration, please send an email (with complete name and date of birth if you need an access badge) to solene.meissonnier@europarl.europa.eu, by Wednesday 23 March 2011.

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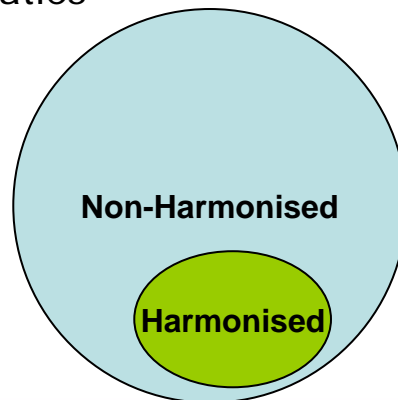
Good politics? Bad law

'in an area like GMOs, it should be possible to combine a Community [EU] authorisation system based on science, with **freedom for Member States to decide whether or not they wish to cultivate** genetically modified crops on their territory'

President Barroso, quoted by spokesperson Amadeu Altafaj Tardio, Press Briefing 9 February 2010.

COM(2010) 375 two-part test:

- 'based on grounds other than those related to **the assessment of** the adverse effect on **health and environment** which might arise' and
- 'in conformity with the Treaties'



Good politics? Bad law

Is this more than, "members states can do what they can (lawfully) do"?

- Not able to deliver on this promise - a theoretical solution without practical benefit
- Cannot unlock political deadlock on cultivation authorisations
- No EU legislative alternative - fundamental incompatibility
- Treaty and case law ties the legislators' hands.

Good politics? Bad law

Legal discussion has focused on:

- **Internal Market Legal Basis**
 - *genuine* objective of improving the functioning of the internal market?
 - Court's "centre of gravity" theory
 - Council Legal Service concluded Article 114 is not a sufficient legal basis for a legislative measure of this nature.
 - Parliament Legal Service concluded Article 114 may be appropriate but even so the practical effect of the measure would be limited.
- WTO compatibility
 - Principally the GATT (rather than TBT or SPS)

Internal Market: beyond the limits of the possible

'The **Union shall** adopt measures with the aim of **establishing or ensuring the functioning of the internal market**...The internal market shall comprise **an area without internal frontiers in which the free movement of goods...is ensured**...'

Article 26(1) and (2), TFEU

Internal market principles permeate Directive 2001/18/EC:

- MS '**...may not prohibit, restrict or impede** the placing on the market of GMOs... which comply with the requirements' Article 22
- **safeguard clause**: 'new or additional information' post consent where 'detailed grounds' indicating a GMO...constitutes a risk to human health or the environment' - may 'provisionally restrict or prohibit' Article 23
- **Post legislative Treaty derogation**: 'new scientific evidence' on 'protection of the environment or the working environment', specific the MS arising after the adoption of the legislation Article 114(5) TFEU
- **Coexistence** clause: narrowly construed economic exception Article 26a

None of this constitutes an opt out at will.

Internal Market: beyond the limits of the possible

Regulatory issues not harmonised are still regulated by EU law:

- **Article 36 TFEU**: prohibitions or restrictions on imports, exports or goods in transit justified on grounds of **public morality**, public policy or public security; the **protection of health and life of humans, animals or plants**; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.
- **'Mandatory requirements'** : (very narrow public interest grounds) established by the *Cassis de Dijon case and subsequent case law*
- Cannot constitute arbitrary discrimination or disguised trade restriction between MS
- Must be justified as necessary and appropriate to achieve objective.

This appears to be what is relied upon now: see **indicative list of 7 restriction/prohibition grounds**: SEC(2011) 184 final.

Internal Market: beyond the limits of the possible

1. Public morals (including religious, philosophical and ethical concerns)

- An opt out could not be lawfully adopted on the basis of an area that the **Directive has already harmonised** (see article 29). **Even if not harmonised**, most MS will not be able to demonstrate this. Council Legal Service concluded that 'substantive, persuasive and unequivocal evidence would be required, rather than assertions'.

2. Public order

- **No credible justification that indefinite national or regional bans on all GMO cultivation is required** for reasons of public order. The Court has held that such action cannot be presumed by national authorities. Any civil unrest in response to GMO cultivation would need to be dealt with by national authorities on a case by case basis in a proportionate manner.

3. Avoiding GMO presence in other products

Article 26a (coexistence) already addresses this. Detailed EU regime for GM food and feed products ensures **labelling and traceability**.

Internal Market: beyond the limits of the possible

Remainder provide no credible justification that indefinite national or regional bans on all GMO cultivation is required for such reasons:

4. **Social policy objectives (maintenance of certain type of rural development in given areas to maintain current levels of occupation)**
5. **Town and country planning**
6. **Cultural policy objectives (e.g. traditions in terms of traditional farming)**
 - Perhaps a reference to Art. 36 protection of 'national treasures possessing artistic, historic or archaeological value' - only ever been relied upon in only one case on the export of works of art.
7. **General environmental policy objectives (other than adverse effects e.g. Maintenance of certain habitats and services)**

WTO: our trading partners

Parliament and Council legal services both flag for concern two breaches of international obligations:

- ❑ **Article III.4 of the GATT**: no less favourable treatment (assuming like products). The analysis of justifications - Article XX - concludes that these are unlikely to be successful.
- ❑ **Article XXIII(b) of the GATT**: nullification or impairment of benefit even in absence of another GATT violation. A far more exceptional route of challenge.

WTO Dispute Panel to conclude, in 2006, that there has been '...a **general moratorium** on final approvals' in the EU and 'an effective decision not to make full use of the relevant procedures to complete the approval process'.

European Communities – Measures Affecting The Approval And Marketing Of Biotech Products,
29 September 2006, Paras. 7.704 and 7.1274

Is this a recipe for a second, avoidable, **WTO dispute** on GMOs?

Final Observations

- Council Legal Service and Parliament Legal Service overlap in that **legal basis aside**, the **practical effect of the measure would be limited or zero**.
- Even if an exception argument might be able to be supported in a particular case - this is a long way from the general MS “opt out” which was the catalyst for this process: **“Do what you can do”**.
- The proposal invites unnecessary **scrutiny by trading partners** and potential tension.
- A new approach needs to be found to unblock the authorisation logjam. Time to think outside of the box.