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The EU Proposal on GM Crop Cultivation: a Real Opportunity for Consumer Preferences?

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In 2010, the European Commission put forward a proposal allowing EU member states to restrict or prohibit GMO cultivation on their territory based on considerations other than those covered by the environmental and health risk assessments existing under the EU authorisation procedure.[1] The proposal would allow member states to rely on non-scientific grounds, such as consumer feelings towards GM crops. This proposal gives EU member states their freedom back in relation to the cultivation of GM crops once these have been authorised at EU level. Nonetheless, at the beginning of 2012, the EU member states failed to reach an agreement on the proposal. This paper will, first, explain the reason behind the proposal and, second, the causes of its collapse. It will also be argued that the proposal would have created an improved system for GMOs.

1. The Justification Behind the Proposal

The details of the proposal will be first developed. Second, it will be shown that the Commission relied on the principle of subsidiarity and the facilitation of the internal market to justify the proposal. Third, it will be demonstrated why consumers and their attitudes towards GMOs need to be taken into account.

[1] Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory, COM(2010) 380 (GM crop cultivation Proposal).

1.1. The Proposal

The existing framework for GMOs in the EU was established by the 2001 Deliberate Release Directive.[2] It relies on the scientific assessment of both environmental and human health risks of GMOs and creates a pre-market authorisation for such crops.[3] Once the GMOs are authorised, they can then be released in the EU.

The approval process for GMOs is generally slow, leading to delays or even a moratorium between 1998 and 2003, moratorium which led to the US and Canada filing a dispute against the EU in front of the WTO.[4] At the moment, two crops are approved for cultivation within the EU: Monsanto MON810 Maize and BASF Amflora starch potato.

New technologies, such as GMOs, raise regulatory challenges. Their regulatory regime must be underpinned by prudence and precaution, legitimacy, effectiveness and connections.[5] Those four questions must be addressed before judging the adequacy of a specific regulatory environment. If the regime fulfils all those conditions, regulators are proceeding in 'the right kind of way'.[6]

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[2] Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the Deliberate Release into the Environment of Genetically Modified Organisms and repealing Council Directive 90/220/EEC [2001] OJ L 106/1. The current regime is complemented by Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on Genetically Modified Food and Feed [2003] OJ L268/1 which deals with the pre-market authorisation of GM food and feed and Regulation (EC) 1830/2003 of the European Parliament and of the Council of 22 September 2003 concerning the Traceability and Labelling of Genetically Modified Organisms and the Traceability of Food and Feed Products produced from Genetically Modified Organisms and amending Directive 2001/18/EC [2003] OJ L268/24 relating to their labelling and traceability.

[3] Article 6, Deliberate Release Directive. For more on this see, M. Grossman, 'Traceability and Labeling of Genetically Modified Crops, Food, and Feed in the European Union' (2005) 1 Journal of Food Law and Policy 43 and M. Friant-Perrot, 'The European Union Regulatory Regime for Genetically Modified Organisms and its Integration into Community Food Law and Policy' in L. Bodiguel and M. Cardwell (ed), *The Regulation of Genetically Modified Organisms: Comparative Approaches* (OUP 2010) 79.

[4] *EC-Biotech: Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R and WT/DS293/R, 29 September 2006.

[5] R. Brownsword and M. Goodwin, *Law and the Technologies of the Twenty-First Century* (OUP 2012) 70.

[6] R. Brownsword, *Rights, Regulation, and the Technological Revolution* (OUP 2008) 9. This paper will show whether those conditions are fulfilled.

In relation to the regulatory prudence and precaution of the GMO regulation, it can be asserted that the regime takes a cautious approach because, first, it imposes stringent measures for environmental and human health risk assessment; second, it establishes a pre-market authorisation; and, third, it limits the authorisation for release of GMOs to ten years.[7] Nonetheless, there is still a lack of scientific consensus on the safety and environmental impact of GMOs and their resulting products. Also, from the point of view of consumers, GMOs still raise scientific uncertainty as well as environmental and human health risk.[8]

At the beginning of 2009, 13 member states asked the Commission to work on a proposal giving flexibility for member states to decide on whether to authorise the cultivation of GMOs.[9] Surprisingly, certain countries who are generally opposed to GM crop cultivation, such as France or Germany, are not part of this group.

The proposal modifies the current regulatory regime for GMOs. It adds an Article 26(b) on Cultivation to the Deliberate Release Directive which states:[10]

> 'Member States may adopt measures restricting or prohibiting the cultivation of all or particular GMOs authorised in accordance with Part C of this Directive or Regulation (EC) No 1829/2003, and consisting of genetically modified varieties placed on the market in accordance with relevant EU legislation on the marketing of seed and plant propagating material, in all or part of their territory, provided that:
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> (a) those measures are based on grounds other than those related to the assessment of the adverse effect on health and environment which might arise from the deliberate release or the placing on the market of GMOs; and,
>
> (b) that they are in conformity with the Treaties.

[7] See Deliberate Release Directive.

[8] As will observed in the different eurobarometers in section 1.3.

[9] Austria, Bulgaria, Ireland, Greece, Cyprus, Latvia, Lithuania, Hungary, Luxemburg, Malta, The Netherlands, Poland and Slovenia. Respective discussions took place at Council meetings of 2 March, 23 March and 25 June 2009.

[10] GM crop cultivation Proposal, Article 1.

> By way of derogation to Directive 98/34/EC, Member States that intend to adopt reasoned measures under this Article shall communicate them to the other Member States and to the Commission, one month prior to their adoption for information purposes'.

This added article raises two types of issues which will be dealt with in this paper: first, which reasons justify a restriction or a ban; and, second, which treaties are being referred in the text.

In February 2011, in a staff working document, the EU Commission provided an indicative list of grounds that could be relied upon by member states. They relate to the public interest, such as public morals (including religious and ethical concerns); public order; avoiding GMO presence in other products; social policy objectives; and cultural policy.[11] Those justifications appear to cover broad socio-economic considerations. Consumer preferences could potentially fall under all the grounds previously mentioned depending on the perspective adopted by a specific member state, region or local area.[12]

By allowing member states to rely on reasons other than scientific, environmental or health ones, it increases the range of grounds on which member states can rely on, giving them more opportunities to listen to the citizens. Such an initiative increases the legitimacy of the proposal.

1.2. Principles of the European Union

One of the reasons why the proposal was put forward is to allow for GMOs to be approved more rapidly at EU level. Measures adopted by Member States can only refer to the cultivation of GMOs only and 'not to the free circulation and import of genetically modified seeds and plant propagating material, as or in products, and the products of their harvest.'[13] The proposal could have created a quicker process as member states would have been more likely to approve a GMO

[11] Commission Staff Working Document Complementary Considerations on Legal Issues on GMO Cultivation Raised in the Opinions of the Legal Service of the Council of the European Union of 5 November 2010 and of the Legal Service of the European Parliament of 17 November 2010 SEC(2011) 184, 2 (Commission List of Grounds).

[12] As will be observed in section 1.3.

[13] GM crop cultivation Proposal, 9.

knowing that they could then rely on Article 26(b) for a restriction or a ban. It would therefore have reinforced free trade and the internal market.

Such an initiative is also in accordance with the principle of subsidiarity.[14] It creates a balance between an authorisation procedure at the EU level based on scientific risk assessments and the possibility for member states to express the concerns of their own citizens without having to rely on scientific evidence or to take into account other member states. It gives a margin of appreciation to member states to express their diversity and for the EU institutions to consider it. It also reinforces the principles of openness and transparency within the EU.

By authorising member states to rely on the public interest to justify a measure adopted under Article 26(b), as well as strengthening the internal market and the principle of subsidiarity, it can be asserted that the proposal fulfils the effectiveness requirement of the regulatory regime for GMOs as it achieves the regulatory purpose of allowing member states to restrict or ban GMO cultivation based on socio-economic grounds.

1.3. Consumer Preferences and their Impact

Recent surveys have been interpreted as showing that the public is no longer concerned about GMOs.[15] However, they only show that consumers have also other worries, such as the financial crisis, current high unemployment rates and austerity measures. GMOs continue to raise issues for consumers such as ethical, moral, social and societal concerns, demonstrating the wide reach of consumers' worries.

Eurobarometers have shown that opponents of GM foods outnumber supporters by three to one, showing no substantial changes in the public perception of GM food between 2005 and 2010.[16] The main concern for consumers is safety, followed by the absence of perceived benefits,

[14] Article 5 of the Treaty on European Union (TEU).

[15] See for instance, 'Populus Survey', British Science Association (March 2012).

[16] Gaskell G et al, 'Europeans and Biotechnology in 2010: Winds of change?' (October 2010) 37. 58% of the respondents to a eurobarometer oppose GM food while 42% do not. Gaskell G et al, 'Europeans and Biotechnology in 2005: Patterns and Trends' (May 2006) 20.

and worry, as GM foods are still seen as 'unnatural and makes many Europeans 'uneasy.'[17] This idea of the 'natural superiority of the natural' leads to consumers rejecting GM food, which reflects the expanding trends for organic and local foods.[18]

Europeans think that GM food should not be encouraged as GM food is seen as not being useful, as morally unacceptable and as a risk for society.[19] For example, in May 2012, a UK organic farmer vandalised the GM crop trial site.[20] The farmer was part of an anti-GM campaigners groups called 'Take the Flour Back'. Such action shows how the British public is still hostile towards GM technology – as reflected by the 2012 British Science Association survey.[21] For Cardwell and Bodiguel, it is clear that the 'public has engaged extensively in the controversy which surrounds GMOs' and that the 'regulation of GMOs is without doubt an area of law where civil society seeks a "voice"'.[22]

GM food bans in the supermarkets started in the EU on May the 1st of 1998 when Iceland – a small UK food retail chain – announced that it had removed all GM ingredients from its own label products.[23] The major early announcement came from a consortium of seven major European food retailers on 17 March 1999 to source non-GM ingredients for their own private labelled products – having a $100 billion in combined sales and 40% in private labels.[24] Within

[17] Eurobarometer 2010 (n 16) 38.

[18] Ibid 7.

[19] Europeans and Biotechnology in 2005 (n 16) 4.

[20] The farmer was charged with criminal damage. See I. Sample, 'Farmer Charged with Criminal Damage at GM Crop Trial Site' (The Guardian, 21 May 2012).

[21] Populus Survey (n 15). Such results are very similar to the findings of the 2003 GM Nation report. See, Department of Trade and Industry, GM Nation? The Findings of the Public Debate (London: Department of Trade and Industry, 2003).

[22] L. Bodiguel and M. Cardwell, 'Genetically Modified Organisms and the Public: Participation, Preferences, and Protest' in L. Bodiguel and M. Cardwell (ed), *The Regulation of Genetically Modified Organisms: Comparative Approaches* (OUP 2010) 35.

[23] See for instance, GeneWatch UK, 'WTO Dispute' (2006) http://www.genewatch.org/sub.shtml?als[cid]=538152 accessed 27 August 2012.

[24] The consortium consisted of the 7 major European retail chains: Sainsbury's and Marks and Spencer (UK), Carrefour (France), Delhaize (Belgium), Migros (Switzerland), Effelunga (Italy) and Superquinn (Republic of Ireland).

the following months, they were joined by Tesco and Waitrose in seeking GM-free products and boosting their organic range.[25] It might also have had an impact on politicians and the establishment of the EU moratorium on GMOs.

Consumer reluctance towards GMOs are the main reason why bans and GM-free zones have blossomed within the EU.[26] Even the Commission recognises that 'GMO cultivation has been acknowledged as an issue with a strong local/regional dimension'.[27]

Currently six member states have established bans on GMOs using the 'safeguard clause' under the Deliberate Release Directive or the Food and Feed Regulation: Austria, France, Germany, Greece, Hungary and Luxembourg. Scotland, Wales, and many other regions throughout the EU. This is why, at present, two crops only have formal approval for cultivation – Monsanto's MON810 Maize and, most recently, BASF Amflora starch potato. Six EU countries have planted GM crops – Spain, the Czech Republic, Portugal, Romania, Poland and Slovakia. In 2009, Bt maize, which is the main biotech crop planted in the EU, covered around 95,000 hectares and was only planted by six EU countries.[28] 134 million hectares of biotech crops in 2009 were grown worldwide (almost half of that was in the US) and they represent the fastest adopted crop technology with an 80-fold increase from 1996 to 2009.

The reasons advanced by consumers for rejecting GMOs all deal with the public interest. More specifically, they could fall under the grounds of public morals, ethical concerns, public order and avoiding the presence of GMOs in other products.

The fact that the proposal as for basis consumer preferences reinforces its legitimacy. In relation to GMOs there is a consensual outcome for the public: they do not want GMOs. Thus, the proposal is based on legitimacy. It strengthens consumer empowerment as consumer preferences would have found a way to be expressed within the political and legal system. It provides a real means for the public to be listened to and to remedy to the democratic deficit of

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[25] See for instance, P. Waugh, 'Tesco and Unilever Ban GM Products Banned' (The Independent 28 April 1999).

[26] List of GMO-Free Regions, http://www.gmo-free-regions.org/fileadmin/files/gmo-free-regions/full_list/List_GMO-free_regions_Europe_update_September_2010.pdf accessed 27 August 2012.

[27] GM crop cultivation Proposal, 8.

[28] ISAAA, 'Global Status of Commercialized Biotech/GM Crops: The First Fourteen Years, 1996 to 2009' (ISAAA 2009) Executive Summary.

the EU. The proposal allows consumer preferences to have a normative input in the regulation of GMOs. Ultimately, it could have contributed to improving European integration by bridging the gap between the European citizens and the European institutions.

Regulatory connection presents a challenge which is threefold: first, regulators must connect a new regulation to a new technology; second, the regime must remain connected to the technology and its development; and, third, if the connection is lost, it must get reconnected.

In relation to the first criterion, getting connected, the 1990 Deliberate Release Directive dealt with risk, scientific uncertainty and created an authorisation process for GMOs.[29] The technology kept evolving and a new regulation was put in place to remain connected to GMOs (the second criterion), the 2001 Deliberate Release Directive. Since its establishment, the development of safeguard measures and GM-free zones show that the current regime is getting disconnected with the regulatees (third criterion). The gap must then be closed and the proposal would have provided a good opportunity. It would also have, as already mentioned, improved regulatory effectiveness as the public might have reconnected with the EU institutions because they could have influenced the system.

2. The Failure of the Proposal

The proposal nonetheless failed in March 2012, as the compromise proposal put forward by the Danish Council presidency failed to achieve the necessary qualified majority at a meeting of EU environment ministers. Two main causes can be identified for its collapse: the question of the compatibility of the proposal with the treaties and the type of substantiation that would be required of member states.

2.1. Threats of Compatibility with the Treaties

In March 2012, a compromise text drafted by Denmark was put forward in order to achieve an agreement on the proposal. It proposed two options: first, 'during the GMO authorisation

[29] Council Directive 90/220/EEC of 23 April 1990 on the Deliberate Release into the Environment of Genetically Modified Organisms [1990] OJ L117/15.

procedure (upon request of an EU Member State), the notifier/applicant has the possibility to adjust the geographical scope of the authorisation, thus excluding part or all of the territory of that EU Member State from cultivation'; and, second, 'after the authorisation procedure, the EU Member State has the possibility to restrict or prohibit the cultivation of an authorised GMO, provided that the national measure does not conflict with the environmental risk assessment carried out at EU level'.[30] However, certain member states, such as France, the UK, Germany, Slovakia, Belgium, Cyprus and Bulgaria blocked the compromise as they still had concerns regarding, in particular, the compatibility of some provisions with WTO law and the internal market. The Danish proposal tried to unblock the EU approval process for GMOs. Unfortunately, an agreement could not be reached, while it could have provided a real opportunity for the public and its preferences to be heard.

The Danish compromise by reducing the scope of the authorisation for a GMO and, therefore, excluding a member state not willing to cultivate such crops, was innovative. It could potentially not have hindered the free movement of goods within the EU as that specific member state would not have been requested to authorise and therefore commercialise such a crop. However, it would have put an end to the EU-wide approval system which is the linchpin of the EU internal market. The compromise diminishes the scope of the internal market. So there would have been no issues for the freedom of goods within that smaller market but it could have led to the fragmentation of the internal market.

As stated in the text of Article 26(b), the measure adopted must be compatible with the EU treaties and other international treaties. The justifications must be compatible with the TFEU which implies that they would have to be justified under Article 36 of the TFEU or mandatory requirements as a ban would be contrary to Article 34 of the TFEU which prohibits quantitative restrictions on imports.[31] Moreover, the measure adopted shall also be justified, proportionate and

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[30] Danish compromise on GM crop cultivation Proposal, 3152nd Council Meeting Environment Brussels, 9 March 2012, http://europa.eu/rapid/pressReleasesAction.do?reference=PRES/12/99&format=HTML&aged=0&lg=en&guiLanguage=en accessed 27 August 2012.

[31] Commission List of Grounds, 2. Article 34 TFEU: 'Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States'. Article 36 TFEU: 'The provisions of Articles 34 and

non-discriminatory.[32] More importantly, the question of the compatibility of such an article with the WTO Agreements is raised. Any restrictions to trade would have to be consistent with WTO law, and in particular the SPS Agreement. As demonstrated by the *EC-Biotech* case, it is likely that the EU regime for GMOs would fall under the scope of the SPS Agreement.[33] The SPS Agreement relies on scientific justification.[34] Therefore, the very fact that this added article relies on non-scientific considerations raised justified issues as to its compatibility with the SPS Agreement and how a measure based on the added article would pass muster under the SPS Agreement.

2.2. What Type of Proof would be Required? Scientific vs. Non-Scientific Risk Assessment

The proposal raised a further issue: how member states would have had to prove that the adopted restriction or ban is indeed based on the public interest. What type of proof would be required from member states in order to prove the 'public interest' basis of their restrictions or bans? Would it require surveys, eurobarometers, public participation, consultation in order to know/prove what consumers want?

The relevance of ethical grounds – and more generally consumer preferences – in the regulation of GMOs was at the centre of a 2009 EU case, *Commission of the European Communities v. Republic of Poland*.[35]

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35 shall not preclude 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. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

[32] Commission List of Grounds, 3.

[33] See for instance J. Scott, *Commentary on the Sanitary and Phytosanitary Measures Agreement* (OUP 2007) and A. Sykes, 'Domestic Regulation, Sovereignty and Scientific Evidence Requirements: A Pessimistic View' in G.A. Bermann and P.C. Mavroidis (ed), *Trade and Human Health and Safety* (CUP 2006) 257.

[34] Articles 2.2 and 5.2 of the 1994 Agreement on the Application of Sanitary and Phytosanitary Measures.

[35] Case C-165/08 *Commission of the European Communities v. Republic of Poland* [2009] ECR I-6843.

In this case, Poland justified its ban on the marketing of GM seeds by relying on recital 9 of the Deliberate Release Directive. It referred to 'the fears expressed by the general public in Poland concerning the harm posed by GMOs to public health and the environment, and the fact that the Polish general public has shown itself to be strongly opposed to GMOs'.[36] Poland also advanced arguments based on ethical and religious grounds referring to Christian and Humanist social principles opposed to the manipulation and transformation of living organisms.[37] Clearly, these reasons would fall under the ground of public morals of the proposal.

The court held, however, that Poland failed to establish that the contested national provisions were in fact adopted on the basis of such considerations.[38] This requirement puts considerable restraints on the possibility of member states to listen to the preferences of their citizens. The court rejected consumer feelings about GMOs whilst these could have been confirmed by looking at national surveys or eurobarometers. The court also added that 'Members of Parliament, who do not, as a general rule, have scientific training, are more likely to be influenced by the religious or ethical ideas which inspire their political actions, rather than by other considerations, in particular, those linked to the complex scientific assessments relating to the protection of the environment or of human health'.[39] The Court of Justice concluded that the contested national provisions infringed the obligations of Poland under the Deliberate Release Directive.[40]

It seems that the free circulation of trade as well as scientific expertise and justification prevailed over the will of member states seeking to rely on consumer preferences. Member states when voting on the proposal might have been wary of such an occurrence for the substantiation of a measure under the proposal. Effectively, under the proposal is that Article 26(b) can only be used by member states once the GMO has already been approved for commercialisation within the EU. Therefore, individual member state risk the possibility that once the GMO is on the market, they might not be able to restrict or prohibit its cultivation. More importantly, the

[36] Ibid §19.

[37] Ibid §31.

[38] Ibid §57.

[39] Ibid §58.

[40] Ibid §60.

document specifies that the grounds cannot be used in the 'abstract' and must meet the scrutiny of the European court.[41] Such an outcome disempowers citizens and strengthens the bias towards free trade and scientific expertise.

Generally, Members of Parliament are supposed to represent their constituencies and therefore listen to them. The *Poland* case puts into question the role of the democratic process when based on consumer preferences rather than a scientific risk assessment. Neoliberalism and its push for economic liberalisation, free trade and open markets lead to a delegation of rights and decisions to scientific experts, where the public is passive. 'Expert advice is emphasised as a way of legitimating decisions.'[42] Democracy is 'put at put at risk by the need to ensure the neoliberal objective of economic optimisation'.[43] This is confirmed in the Communication on the Competitive Environment for Biotechnology which highlights the promotion and competitive environment for the biotech industry and in the Commission Life Sciences Strategy which are clearly pro-biotech.[44]

3. Conclusion

The proposal has shown the importance of consumer and their preferences in the EU. It would have allowed consumer preferences to play a normative input in the regulation of GMOs. The EU institutions and its member states might have had cold feet about giving such power to the public. The failure of the proposal demonstrates that consumer preferences were ignored to favour less controversial means such as scientific risk assessment or free trade.

The current regulation of GMOs lacks regulatory adequacy mainly by being disconnected to the public, while the proposal was the right thing to do and would have established a satisfactory regime, connecting law and morality.

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[41] Commission List of Grounds, 3.

[42] M.L. Flear and A.Vakulenko, 'A Human Rights Perspective on Citizen Participation in the EU's Governance of New Technologies' (2010) Human Rights Law Review 678.

[43] Ibid 675.

[44] See 1991 Communication from the Commission, Promoting the Competitive Environment for the Industrial Activities Based on Biotechnology within the Community, SEC(91) 629 final and 2002 Communication on 'Life Sciences and Biotechnology – A Strategy for Europe' COM(2002)27 [2002] OJ C55/3.

In January 2012 the German biotech and chemical company BASF announced its withdrawal of its research and development operations on GM crops in the European market. The main reason is consumers, farmers and politicians' opposition.[45] Similarly, in February 2012, Monsanto declared that it would stop the sale of GM MON810 maize in France from 2012 because of the hostility from the public and the French government. Monsanto considered that there was a lack of favourable conditions for the sale of this crop.[46] Monsanto and BASF have started to understand the influence that consumers and their preferences can have. It is now time that the EU institutions do the same.

[45] See for instance, R.Trager, 'BASF Pulls Out of Europe over GM Hostility' (Royal Society of Chemistry, 18 January 2012) http://www.rsc.org/chemistryworld/News/2012/January/basf-pull-out-gm-crops-biotech.asp accessed 27 August 2012.

[46] N. Gray, 'Monsanto Scraps GM Maize in France' (Foodnavigator.com, 1 February 2012) http://www.foodnavigator.com/Financial-Industry/Monsanto-scraps-GM-maize-in-France accessed 27 August 2012.