November 2006

Summary of the Key Points from the Legal Opinion by Paul Lasok QC and Rebecca Haynes "In the matter of DEFRA's Proposals for Managing the Coexistence of GM, Conventional and Organic Crops"

This briefing summarises the legal opinion[1] provided for The Soil Association, Friends of the Earth and GM Freeze by leading European Law experts. The opinion is that Defra's coexistence proposals are not compatible with European Law and are not a sound basis for future regulations in England.

Background

Avoiding GM contamination of non-GM crops and organic crops and of the environment is a key concern for communities and farmers. European legislation gives Member States the power to introduce coexistence measures, such as separation distances between GM and non-GM crops. They may "*take appropriate measures to avoid the unintended presence of GMOs in other products*"[2].

On 20 July 2006, Defra published its consultation proposals for coexistence measures for England for public comment [3]. Defra stated it was "*seeking comments on a proposed coexistence regime for England that would aim to minimise any unwanted GM presence in non-GM crops so that it is below 0.9%*".

However, if Defra's proposals were implemented, the right to make any meaningful choice for non-GM crops and food would rapidly disappear because contamination would become routine.

Defra's proposals are for regulations under the European Communities Act. Unless they conform with EC legislation they will be unlawful.

Key points

According to the legal opinion, Defra's proposals on GM and non GM crop co-existence are "fundamentally flawed".

This is because they have followed a non-legally binding European Commission recommendation which itself is wrong in law[i]. And in some areas Defra go even further:

- They are proposing that the majority of landowners would not be informed if GM crops were planned in their vicinity. Only landowners within a very short radius of the crop (eg 35m for oilseed rape) would be legally required to be informed.
- Defra does not think that gardeners and allotment holders and beekeepers should be informed at all.
- Defra has also turned its back on effective regulations by rejecting the EC requirement to establish GM crop public registers, saying they are "difficult…to justify". Instead they support the use of voluntary schemes for many aspects of coexistence including equipment cleaning and for liability for any economic damage caused by contamination from GM crops.

Details of the legal challenges to Defra's proposals

Paul Lasok QC and Rebecca Haynes' legal opinion says that Defra's proposals do not conform with European law because:

1. Defra adopts a 0.9% GM baseline for crops in the field, whereas 0.9% is the threshold for labelling. The opinion says:

"The labelling thresholds are … legally irrelevant so far as the scope of coexistence measures is concerned" (Paragraph 28).

There is no legislative provision requiring Member States to limit co-existence measures to go no further than those necessary to keep GM content below the labelling threshold of 0.9%.

2. Defra proposes to limit the scope of coexistence rules to purely economic factors. The opinion says:

"[the legislation] was not intended to be limited in scope to the economic aspects of coexistence" (Paragraph 51).

GM legislation recognises an ongoing need to protect health and the environment[4]. There are, for example, continuing monitoring requirements and a safeguard clause which allows GMOs to be suspended and withdrawn.

3. Defra's proposals are to minimize, rather than avoid, GM contamination through coexistence measures. This, the opinion says:

"is a flawed approach to the Community legislation" (Paragraph 23).

Article 26 (a) of Directive 2001/18 states *"Member States may take appropriate measures to **avoid** the unintended presence of GMOs in other products"*.

---

[i] In July 2003, the European Commission issued a Recommendation providing guidance to Member States for putting in place national coexistence measures http://europa.eu.int/comm/agriculture/publi/reports/co-existence2/guide_en.pdf .
The Recommendation tried to significantly narrow the power given to Member States under EU Legislation. Paul Lasok and Rebecca Haynes also provided a legal opinion on this Recommendation which they also found to be also legally flawed. This can be viewed at http://www.foe.co.uk/resource/briefings/legal_opinion_in_the_matte.pdf

4. Defra wrongly applies provisions allowing "adventitious" presence to coexistence measures. The opinion says:

"It would seem to us to be strongly arguable that GM presence which is "built-in" or inherent by virtue of a generally applicable base-line norm or tolerance does not accord with the definition of adventitious presence" (Paragraph 45).

The labelling threshold of 0.9% only applies to GM content that is 'adventitious or technically unavoidable' i.e. accidental. Operators have to prove that they have taken steps to avoid the presence of such material. It is argued that GM presence which is "built-in", for example by designing co-existence measures to allow up to 0.9% GM contamination, can not be defined as adventitious, and therefore any known contamination would have to be labelled.

5. Defra has wrongly assumed an approach that coexistence rules have to be proportionate and not interfere with GM crop cultivation. The opinion says:

"what is proportionate in the circumstances is a matter of fact and technical assessment and must have regard to the legislative aim" (Paragraph 38).

and

"we conclude that there is no legislative provision which requires a Member State to limit its coexistence measures to go no further than is necessary in order to ensure that GM content stays below the Community's labelling threshold" (Paragraph 42).

Coexistence measures have to "*avoid the unintended presence of GMOs in other products".* Therefore measures can only be disproportionate if they seek to exceed this aim.

6. Defra suggests that a GM Crop Site Public Register is not legally required under EU Law. The opinion says:

"Its position that there is no requirement in law for a public register is fundamentally flawed and ignores the provisions of Directive 2001/18" (Paragraph 6).

Public registers would not only help enforce coexistence schemes but are also vital to facilitate post release monitoring of GMOs (a legal requirement) and future land sales and management.

7. Defra excludes allotment holders and gardeners from those who should be legally informed of the intention to plant a GM crop near their land. The opinion says:

"this approach is fundamentally flawed" (Paragraph 56).

In saying that only farmers who place products on the market need be informed Defra ignores or fails to understand the very wide definition of "placing on the market" in EU law[5], i.e.:

"The holding of food […] for the purposes of sale, including offering for sale, or any other forms of transfer, whether free of charge or not, and the sale distribution and other forms of transfer themselves".

Organic and Seed GM Thresholds EU decisions awaited

The European Commission wishes to introduce GM thresholds in organic production and for conventional seeds. In its consultation paper Defra erroneously assumes that these thresholds have already been agreed at 0.9% for organic products and 0.3-0.5% for seed (depending on species). Neither of these assumptions is correct because the EC proposals are very contentious and are still being hotly debated. Defra's proposals would have to be re-thought if these thresholds are lowered during negotiations.

Conclusion

Coexistence measures should aim to prevent unintended contamination of non-GM produce and not to merely minimise such contamination to tolerance levels which the government deems acceptable. Defra's proposals are legally flawed. If Defra's coexistence proposals were adopted, they would fail to protect food, farming and the environment, and would be likely to lead to widespread GM contamination of conventional and organic crops.

Defra's proposals would also lead to problems for the food chain over the labelling of GM content below 0.9%. Any routine GM presence in conventional and organic crops arising from short separation distance between GM and non-GM crops could not be classed as adventitious or technically avoidable presence.

Farmers supplying markets which specify no GM presence would be seriously disadvantaged by Defra's proposals which would mean very limited access to financial redress based on an industry lead voluntary scheme.

Secondary legislation, such as regulations, can be challenged for illegality in the High Court.

Defra should reconsider its proposals in the light of the opinion and afford stricter protection to protect the environment, health and maintain a genuine right to choose between GM, non-GM and organic food and animal feed.

Other administrations in the UK should consider the legal opinion very carefully before proposing coexistence measures to avoid the fundamental legal flaws in Defra's consultation document for England.

References

1 Advice - In The Matter of Defra's Consultation on Proposals for Managing the Coexistence of GM Conventional and Organic Crops K.P.E. Lasok QC and Rebecca Haynes 13th October 2006 http://www.foe.co.uk/resource/consultation_responses/coexistence_legal_opinion.pdf

2 Article 26a of Directive 2001/18

3 http://www.defra.gov.uk/corporate/consult/gmnongm-coexist/index.htm

4 Deliberate Release Directive 2001/18/EC; Regulation 1829/2003 on GMO food and feed; Regulation 1830/2003

5 EC Regulation 1829/2003 Article 2