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By email stuart.wainwright@defra.gsi.gov.uk

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Dear Mr Wainwright,

Re: Commission Proposals on the Freedom for Member States to Decide on the Cultivation of GM Crops

Thank you for your letter of 9th August 2010 requesting comments on the implications of the European Commission's proposals to allow Member States to decide on the cultivation of GM crops.

Our comments are in four sections:

1. The principle behind the proposals.
2. Unresolved issues relating to GMO approvals and cultivation.
3. The legal implications of the proposals.
4. Practical implications of the proposals

The motivation behind the Commission's proposals is clear – the desire to speed up the GMO application process for cultivation approvals. This is crystal clear in the Commission documents:

"Member States are expected to adopt a more positive stance at the stage of risk assessment and avoid having to recourse to the safeguard clause to address non-scientific issues."

This is not a sufficient basis upon which to proceed.

1. The Principles behind the proposals

The principle of allowing individual Member States to eventually decide whether or not GM crops should be cultivated on their territory is a good one. It would allow flexibility into what on paper is a rigid system dictated by the European Commission. Such flexibility would allow for national and local factors to be used as reasons for banning a GM crops. This would better reflect the huge difference in biodiversity in biogeographical regions across the 27 Members States. There are also significant differences in size of holdings, land use and landscapes, which are reflected in the many different rural economies across the EU. Therefore treating the EU land area as an amorphous mass has never been a sensible policy, and we are surprised it has taken the Commission so long to realise this. Maintaining a high degree of diversity in rural economies seems to us to be highly desirable and should be rightly placed ahead of the interests of biotech companies.

There are also considerable differences across the UK in land use, landscape, biodiversity and rural economy. This has already led to significant policy differences on GM crops between Whitehall and both Wales and Scotland, raising ongoing unanswered questions about how the UK voting position in Europe reflects the policies in operation.

The EC proposals are in principle step in the right direction because the Commission's original vision of wall-to-wall GM crops right across Europe was seriously flawed as it simply does not fit with the aspirations of the majority of EU residents, consumers and farmers. In fact, it would allow the minority of farmers with large estates and biotechnology corporations to dictate the type of food and countryside for the vast majority of EU citizens against their wishes. Many regions and towns and cities across the EU have already decided that they wish to remain GM-free (see www.gmo-free-regions.org/gmo-free-regions.html), including Wales, the

Highlands of Scotland and many local authorities.

2. Unresolved issues relating to GMO approvals and cultivation.

Despite our “in principle” welcome for the proposals, we have deep reservations about what has been offered by the European Commission (EC). The EC proposals appear to be conditional and ignore several fundamental issues, such as improving the quality of risk assessments, agreeing seed thresholds, ensuring that farmers can grow without the worry of contamination, introducing strict liability laws for economic harm and ensuring that consumers’ right to choose GM-free products are upheld.

The Commission have stated that they expect Member States to adopt “a more positive position” on the approvals of GM crops for cultivation at a time when there are ongoing negotiations about how the risks assessments of GM crops can be improved to reflect the concerns previously expressed by Member States and the EU public. In their conclusion on genetically modified organisms of 5th December 2008, the Council set out its views for improving the regulatory process for GM approvals by:

- Re-affirming the need for a high level of protection for the environment, human and animal health.
- Re-affirming the use of the precautionary principle.
- Calling for strengthening of environmental risk assessments and monitoring (particular the long term, indirect and non target impacts).
- Calling for the adoption of appropriate GM thresholds in seeds.
- Underlining the need to take account of specific regional and local characteristics.
- Underlining that wildlife sites may need special protection.
- Calling for socio-economic issues to be assessed by the Commission.
- Welcoming improvements in transparency of Member States views on risk assessments.
- Calling for improvement in the involvement of Member States in risk assessments.

Many processes instigated by the Council’s conclusions are still to be completed and agreed (for example improving the environmental risk assessment and seed thresholds). The timing of the Commission proposals is therefore difficult to understand, unless their sole wish is to see the 16 GM crops with applications for cultivation pending to be approved as soon as possible.

GM Freeze believes that it is premature to bring forward proposals on devolving powers to Member States before these issues are resolved and any changes agreed are in force.

3. The legal implications of the proposals.

To be effective and allow Member States the freedom to exclude GMOs from all or part of their territory, the legal grounds for doing so have to be clear and unequivocal. Earlier drafts from the Commission were heavily criticised by leading lawyersⁱⁱ (Defra have a copy of this opinion). Prof. Dr. Hans-Georg Dederer from the Faculty of Law at the University of Passau has also expressed doubts as to whether what the Commission proposals will enable Member States to invoke national bans on GMOsⁱⁱⁱ.

Thus the questions we posed to the Secretary of State in our letter of 23rd July 2010 remain highly relevant and must be addressed before the EC proposals are taken further:

1. If a GM crop was restricted or banned in any Member State, what legal grounds will enable them to do so without the risk of legal challenge?
2. Will the proposals enable Wales, Scotland and Northern Ireland to follow their own restrictive policies on GMO cultivation without risk of legal challenge?
3. Do the proposals from the Commission fully comply with the Treaty on the Functioning of the European Union (TFEU) in particular in relation to Article 2 (2), Article 5(4), Article 114 (5) Articles 34 and Article 36, and will Member States be able to ban or restrict GMO cultivation without breaching any part of the Treaty and thereby leave themselves open to legal challenge?
4. Do the proposals meet international treaty obligations of the EU, in particular with the ones established under the WTO, and could bans be implemented without risk of inventions by third parties?
5. Will the proposed new article 26b in Directive 2001/18 provide Member States with any more powers to restrict the cultivation of GMOs than already available under Articles 26a, Article 23 and Article 19 of 2001/18? If not why is the Commission proposing it?

6. If Member States opt to use Article 26b will they have the necessary legal surety that the ban or restriction will be upheld in the face of any legal challenge?
7. Will Member States using the Commission Recommendations of Coexistence published on 13th July 2010 be able to adopt measures that avoid the contamination of conventional and organic crops without risking legal challenge (ie, at a threshold below 0.9% of their own choosing)?
8. Will all pending applications for GMO cultivation (under Part C of 2001/18) be assessed for risk using the new risk assessment procedures currently under discussion between EFSA, the Commission and Member States before they are put a vote at the Council?
9. Will outstanding policy issues on liability and seed purity be agreed and implemented before any new GMO approvals for cultivation are voted upon?
10. Has the Government considered the legal implications of authorizing GMOs if warnings of adverse health impacts are ignored then prove true?
11. Will the European Commission postpone further authorisations of GM crops until all other Council conclusions from December 2008 are fully implemented?

These questions are crucial for farmers, consumers and governments and need to be answered in detail before any decisions regarding the Commission proposals are made.

GM Freeze is concerned that the proposals contain significant flaws which will lead to legal uncertainty and no clear policy direction which could guide future cropping patterns.

4. Practical implications of the proposals

The EC proposals raise many practical issues that could impact on their effectiveness if they are ever implemented. These include:

1. How will the movement of GM seeds across the EU be policed given that seed companies operate in many different states?
2. Who will monitor GM presence in seeds given the free market is to be maintained?
3. How will border issues between GM growing countries/regions and non-GM growing regions be resolved in terms of preventing cross boundary GM contamination ?
4. Where farms cross borders and therefore come under different GM crops approvals or different coexistence/liability regulations be resolved?
5. Will neighbouring countries be able to operate different GM thresholds/separation distances in coexistence regimes and how will this operate along borders?
6. How will boundaries for establishing areas where all or some GM crops are to be prohibited within a Member States be decided?
7. If problems arise from growing a GM crop, will Member States be able to ban them immediately after having first approved them?
8. Will bans on GM crops include test crops?
9. For how many years will GM crop bans be in force?
10. How will farmers in GM countries be protected against GM contamination from neighbouring crops, particularly if their main market is non-GM?

GM Freeze strongly recommends to Defra that no final decision on the EC proposal is given until all the outstanding questions are answered satisfactorily. Any changes to the proposals made during the course of negotiations, and talks with the Commissions, should be the subject of further public consultations before finally being signed off.

Please contact me if you have any questions about this response.

ⁱ From The European Commission's Explanatory Memorandum

ⁱⁱ See www.gmfreeze.org/uploads/lasok_and_haynes-GMO_cultivation_ADVICE.pdf

ⁱⁱⁱ See www.gmo-safety.eu/debate/1206.nationalisation-gmo-cultivation-decision-buck-passed-member-states.html