

Simultaneously with the authorization decision, the Commission announced its plan to develop by the summer a proposal allowing Member States more freedom to decide whether or not to cultivate GMOs on their territory. This development follows a declaration by Jose Manuel Barroso made in the run-up to his nomination for a second term as President of the European Commission. In his "Political Guidelines for the Next Commission", he stated the intention of the Commission to introduce some changes in the framework to the effect that a Community authorization system based on science would be combined with granting greater freedom to Member States to decide whether or not they wish to cultivate GM crops on their territory.

The Commission compromise affording more flexibility in the GMO authorization framework comes after months of pressure from national governments. In specific terms, at the Environmental Council of March 2009, the Netherlands introduced a declaration proposing that Member States should have the right to decide unilaterally on issues of GMO cultivation. This initiative was taken up and further developed by Austria in the subsequent Council meeting of June 2009. It proposed an amendment to the regulatory framework in the form of an opt-out clause giving Member States the right to prohibit indefinitely the cultivation of GMOs on their territory. The Austrian declaration was officially supported by ten other Member States. It is worth noting that Austria and the Netherlands both advocate what would in effect be a devolution of competences to the national level but for very different reasons as they stand at the opposite ends of the spectrum with regard to GMOs. The Netherlands has traditionally supported genetic engineering and is dissatisfied with the slow EU regulatory process impeding its progress in this field. On the other hand, Austria – of all EU countries perhaps the most skeptical towards GM technology – supports devolution so that it can ban the cultivation of GMOs on its territory.

At the moment the European Commission is also working on a separate reform initiative meant to broaden the scope of concerns to be taken into consideration during the risk management phase. In December 2008, the Environment Council unanimously supported a declaration attached to its Council Conclusions that called for a strengthened environmental risk assessment, greater freedom for Member States to decide on GM-free zones, and an appraisal of socio-economic benefits and risks. Fol-

lowing this Council mandate, the European Commission launched a consultation procedure soliciting input from Member States on what they consider to be socio-economic aspects that should be taken into account when authorizing GMOs. With the deadline for national submissions now over, Member States are currently awaiting the results of the consultation, which should produce a preliminary proposal of a possible common definition of what socio-economic considerations entail. This initiative reveals pressure being exerted by Member States to go beyond scientific risk analysis for taking authorization decisions.

With the authorization of the Amflora potato, the second Barroso Commission has demonstrated a resolve to find solutions to the regulatory deadlock on GMO authorizations. The decision to move forward with authorizations of GM crops for cultivation is counterbalanced by the greater freedom afforded to Member States to decide whether to ban the cultivation on their own territory. While the Amflora potato is being cleared for planting in this spring season, the exact legal parameters of the compromise promising more flexibility for EU countries remain to be unveiled at the next Council meeting in June 2010.

## The first GMO Case in Front of the US Supreme Court: To Lift or Not to Lift the Alfalfa Planting Ban?

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Alfalfa is one of the most important legumes used in agriculture and the fourth most cultivated plant behind corn, soybeans and wheat in the US<sup>1</sup>. It has been grown in almost all federal states, occupies 9 million hectares and is primarily used in feed for dairy cows and beef cattle. US consumers also eat GM alfalfa as sprouts in salads and other foods. Roundup Ready alfalfa was developed by the agrobiotechnology firms Monsanto and Forage Genetics. It was originally approved in June 2005 for commercial sale by the US Department of Agriculture

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1 Alfalfa is a flowering plant which belongs to the pea family *Fabaceae* cultivated as an important forage crop. It is also widely known as lucerne and as lucerne grass in south Asia. It resembles clover with clusters of small purple flowers.

(USDA)<sup>2</sup>. Alfalfa is designed to tolerate the leading active substance in Monsanto's trademark Roundup herbicide, glyphosate. It is also the first genetically modified perennial crop to be commercialized. As a result, its cultivation poses special environmental, agricultural and economic risks.

In 2007, a coalition of diverse environmental groups led by the Center for Food Safety<sup>3</sup> accused the USDA of violating *inter alia* the National Environmental Policy Act (NEPA) by failing to prepare a full-fledged Environment Impact Statement (EIS) for Monsanto's petition. In particular, they claimed that the EIS was insufficient with regard to possible environmental damage, such as might occur through outcrossing of alfalfa with conventional plants or wild relatives as well as through the spread of resistant weeds.

On February 13, 2007, US District Court Judge Charles R. Breyer of the Northern District of California ruled that USDA failed to abide by federal environmental laws when it approved the crop without conducting a full EIS. According to the Judge, USDA did not adequately evaluate the potential environmental and economic impacts of GM alfalfa. In particular, the judge found that plaintiffs' concerns that GM alfalfa will contaminate natural and organic alfalfa were valid, stating that USDA's opposing arguments were "not convincing" and did not demonstrate the "hard look" required by federal environmental laws. USDA argued that, based on a legal technicality, the agency did not have to address the economic risks for organic and conventional growers whose alfalfa crop could be contaminated by Monsanto's GE variety. Yet the judge found that USDA "overstates the law ... economic effects are relevant when they are 'interrelated' with 'natural or physical environmental effects' ... here, the economic effects on the organic and conventional farmers of the

government's deregulation decision are interrelated with, and, indeed, a direct result of, the effect on the physical environment." As a result, the federal judge issued a judgment banning the planting or sale of Roundup Ready alfalfa until USDA re-approves it on the basis of a full Environmental Impact Statement. This is the first-ever moratorium on a genetically modified seed in the US. One may notice that the Federal Court not only recognized that USDA failed to consider the environmental and economic threats posed by GE alfalfa, but it also questioned whether any agency in the federal government is looking at the cumulative impacts of GE crop approvals.

Monsanto appealed to the Ninth Circuit, arguing that the permanent injunction was overly broad. In June 2009, the US appeals court refused to lift the ban on GM alfalfa until the federal government has finished its study on how the product could affect organic and conventional crops, and the environment and economic well-being of farmers. In her opinion for the Court, Circuit Judge Mary M. Schroeder upheld Judge Breyer's finding that "the harm to growers and consumers who wanted non-genetically engineered alfalfa outweighed the financial hardships to Monsanto and Forage Genetics and their growers." The EIS has now been prepared. The USDA found no safety concerns with Monsanto's alfalfa, paving the way for an end to the ban.

In the meantime, Monsanto filed a petition for *certiorari*, thus taking the fight all the way to the highest court in the land. It challenged the authority of the federal court to block the alfalfa seed sales. The US Supreme Court granted the *certiorari*. According to sources present at the hearing on April 27, 2010, Supreme Court justices sounded sceptical on the federal court decision blocking US biotech giant Monsanto's sale of genetically modified alfalfa. In particular, justices had questions about whether the environmental impact could be addressed before the USDA had carried out an impact study. It has been reported that Judge Antonin Scalia minimized potential risks during the hearing by saying that "This is not the contamination of the New York city water supply. This isn't the end of the world. It really isn't."

*Monsanto v. Geertson Seed Farms* is the first case involving GM crops to be heard by the Supreme Court. It could have wider implications for the approval process of other GM crops, such as Monsanto's Roundup Ready sugar beets, which have also faced opposition from environmental groups<sup>4</sup>.

2 The Plant Protection Act of 2000 (PPA) directs the Secretary of Agriculture (in this case, the Animal and Plant Health Inspection Service (APHIS)) to promulgate regulations to prevent the "introduction of plant pests into the United States or the dissemination of plant pests within the United States." Pursuant to that authority, APHIS has issued regulations governing the introduction of genetically modified organisms that are believed to be plant pests. If an organism is identified as such, a company or individual may petition APHIS for a determination that the organism does not present a plant pest risk and is thus not subject to the regulations.

3 WORC, Dakota Resource Council, Center for Food Safety and others.

4 Legal proceedings also have taken place meanwhile on the subject of GM sugar beets, which have been approved in the USA since 2005 and which were planted on 450,000 hectares in 2009.