

Briefing

No GMO liability? No GMO releases:

Why new liability laws are needed for GMO food and crops

This briefing examines why specific environmental and product liability laws are urgently required for genetically modified food and crops. It sets out why existing legislation is inadequate and what should be done to improve it. Until effective new laws are in place, no further releases should be allowed.

Background

Genetic modification (GM) is a new technology that is being introduced across Europe under intense commercial pressure. The splicing of genes from one species into another and the use of these and similar techniques in agriculture has only developed over the last two and a half decades, yet the commercial products of these processes are already in human and animal food chains.

Those who stand to profit from GM technology in food and agriculture have been quick to point out the potential benefits but less keen to face up to the uncertainties of such a young technology. These include the long and short term impacts on:

- ✂ other crops or species
- ✂ ecosystems
- ✂ human and animal health
- ✂ socio-economic factors

In the past many technologies have been introduced before their environmental and health risks have been fully evaluated. For instance, pesticides such as DDT introduced in the 1950s have subsequently been shown to have dramatic impacts on the health of wildlife and human health, including hormone disruption.

The agro-chemical companies who brought them to market have not been required to take full responsibility for their products. Programmes to reintroduce damaged wildlife or to re-instate habitats have been largely funded by charities and public bodies. In cases such as these it is often the polluted who have to bear the cost of damage or the clean-up, while the polluter does not have to pay and so has little incentive to prevent the damage

or pollution in the first place.

The principle that “the polluter should pay” is part of EU law and is generally agreed to be fair and effective at preventing damage. Legislation specifying who is liable for any damage and allowing citizens to seek redress can be a very effective way of ensuring that the polluter pays. In particular, a civil liability regime can help to balance the powerful commercial interests of producers with the protection of the environment, public health and the livelihoods of other business people.

In the event of damage by the release of genetically modified organisms (GMOs) into the environment and food chain, under current European law, the biotechnology industry would also largely avoid liability for compensating those affected or restoring the environment. It is high time that companies introducing new technology or products should be held liable for any harm arising from their actions.

Why have a GMO-specific regime?

There is an urgent need for a civil liability regime that is specific to GMOs.

Genetic modification of plants poses an entirely new level of risk

Once released in the environment, GMOs and micro-organisms have the capacity to multiply and spread through food chains and ecosystems by replicating or transferring their modified genes to other organisms which in turn can reproduce and spread the genes (this is known as GMO pollution). GMO pollution is unlike other kinds of pollution in that it is self-replicating. Thus if a particular modification turned out to do harm it may be very difficult to “clean up”.

In addition, the random splicing of novel genes into plants has been shown to produce unpredictable effects on the recipient plant. For example, the starch metabolism of the potato was radically changed by the introduction of a novel geneⁱ. The British Medical Association have also pointed to the risks. “*The possibility that novel genes inserted into food may cause problems to humans is a real possibility and ‘substantial equivalence’ is a rule which can be used to evade this biological fact*”ⁱⁱ

Prevention is better than cure

The long-term consequences of gene transfer into wild species are very difficult to predict and the true impact may only become clear once full scale commercial growing has taken place for several years. Similarly, the indirect effect of GM crops on wildlife, for instance on food supply for farmland birds, could take many years to emerge. Therefore claims that there is no evidence

ⁱGURA, T. (2000). *Reaping the plant gene harvest*. Nature **287** 412-414

ⁱⁱ British medical Association Board of Science and Education (1999). *The Impact of Genetic Modification on Agriculture, Food and Health. An Interim Statement*. May 1999, p.8

of damage and that liability is not needed, are not only scientifically dubious, but, at best, complacent.

Introducing a strict liability regime now, when the industry is in its infancy and GMO crops are not widely spread, is far more likely to be effective at preventing future damage - one of the key aims of liability.

GMO Polluters are not paying

GMO pollution of plants is already occurring across Europe and the world (see examples below). These cases show just how vulnerable farmers and beekeepers are to GM contamination. In none of these cases have those responsible for the release of the GMO been held fully legally liable for any damage that has occurred.

The Canadian Seed Contamination Scandal

In spring 2000, biotechnology seed company Advanta announced that they had discovered that batches of seeds of their non-GM spring oilseed rape, "Hyola 38" were contaminated with Monsanto's GM herbicide-tolerant "GT73" which was not authorised for cultivation in the European Union. Advanta blamed this contamination on cross pollination of their seed crop with a GM crop at least 4000 metres awayⁱⁱⁱ. The contamination affected at least four EU countries: France, Germany, Sweden and the UK. Over 5000 hectares of contaminated seed were grown^{iv}.

Farmers in the UK, France and Sweden could not sell their crops or were forced to destroy them. Advanta offered compensation to the farmers affected as a goodwill gesture, but denied responsibility. Neither Advanta nor Monsanto were held legally liable.

GMO-contaminated honey in Austria

In June this year, Friends of the Earth Austria discovered that Canadian honey in shops was contaminated with pollen from Monsanto GM oilseed rape not approved in the EU. Retailers were not compensated for their loss of stock.

GMO-contaminated maize in France

In June 2000, farmers in a large area of south-western France found they had unwittingly sown maize, imported from North America, which was contaminated with 3 GMO varieties, one which is only allowed into the EU for processing, not for growing. Despite general consensus in the French government that the maize should be destroyed, and strong pressure from environmental/consumer organisations to do so, in the end the maize was allowed to grow on. This was because the French Maize Growers Association

ⁱⁱⁱ Agriculture Committee (2000). *Genetically Modified Organisms and Seed Segregation* 26th July 2000 Column 8

^{iv} Agriculture Committee (2000). *Genetically Modified Organisms and Seed Segregation* 26th July 2000 Column 31

threatened to sue the government if it ordered the destruction of the maize. Because the level of contamination by the unauthorised variety (Bt11) was less than 1% and because it was only found on about 1000 hectares of land, the government backed down, complaining that the EU's legislative framework did not provide a legal basis for it to act.

GMO-contaminated cotton in Greece

Greece is among the top 10 cotton-producing countries in the world. In summer 2000, more than 4000 hectares of land was planted with imported cotton seed contaminated with GM varieties (no GM cottons are approved by the European Union). Although it first decided that the contaminated cotton should be dug up, the Greek government changed its mind and reversed its decision announcing that the fibre will be exported to developing countries and the seed to the United States. Many believe that the government's about-turn was due to compensation claims from farmers and the lack of a liability regime for GMOs in the European Union.

Winners and Losers

The absence of a specific GMO liability regime does not take away the need to pay for any harm caused by GMOs. Someone will pay - the problem is it is likely to be the victims or the innocent. At best, the lack of a clear regime means that the winners are the lawyers, with parties along the chain of pollution suing and counter-suing each other.

Consumers

Without a clear liability regime if GMO foods are found to be bad for health, consumers will find it very difficult to seek compensation, or to claim the costs of any healthcare required.

Farmers and Beekeepers

In the case of GMOs cross pollinating neighbouring crops, the lack of a specific liability regime will leave farmer pitted against farmer in the courts.

Wildlife and ecosystems

A specific liability regime is needed to allow someone to seek redress in the case of GMO damage to biodiversity or other commonly "owned" environmental resources.

Biotechnology companies

While these companies stand to profit from their products, a lack of a specific GMO liability regime will allow them to off-load the risks and cost of clean up onto others.

EU Liability Legislation - Inadequate

At present, the only EU-wide legislation on liability relevant to GMOs is the Directive concerning liability for defective products (Directive 85/374/EEC amended by Directive 99/34/EC) which deals with damage to persons or goods caused by a "defective product". It applies to primary producers including farmers.

However, this Directive does not cover environmental damage and would not cover harm caused to consumers by GM foods or crops which had been approved for commercial growing or as a food (under the GMO Deliberate Release Directive 90/220/EC and the Novel Food Regulation 98/257/EC), but were subsequently found to cause harm. In such cases, people who suffer harm would have to seek compensation from the government.

The GMO Deliberate Release Directive (90/220/EC) has been under revision since 1997 and is due to be finalised through the EU "co-decision procedure" in early 2001. A clause calling for a specific regime of liability for biotechnology companies in case of harm to human health and the environment was included during the second reading of the revised directive in 1999 but was not adopted by the European Parliament in April 2000. The rejection was due to intensive lobbying by the biotechnology industry and the

insistence of the EU Environment Commissioner, Margot Wallström, and Consumer Affairs Commissioner, David Byrne, that environmental liability should be dealt with by a later Directive covering all forms of environmental damage. The biotechnology industry has supported the introduction of such a “horizontal” Directive as opposed to specific legislation on GMOs.

EU-wide GM crop approval moratorium should stay

One of the key reasons why GM crops have not become widespread across Europe is because of the effective EU-wide moratorium on the approval of GM crops agreed by the Environment Council in 1999. The moratorium came as a result of growing public concern over the inadequacy of the current Deliberate Release Directive.

The French Government which currently holds the EU presidency, has stated in a memorandum on the revised Deliberate Release Directive issued in summer 2000, that civil liability should be the focus of finalising the Directive. Along with Denmark, Germany, Greece, Italy and Luxembourg (and supported to some extent by Austria and Belgium), the French authorities believe there is no justification for lifting the current “de facto” moratorium on GMO approvals until there is a liability regime.

The proposed EU environmental liability regime - too little, too late

The EU has been talking about introducing environmental liability legislation since the late 1980s but has failed to do so. Eventually, an EU White Paper was proposed by the European Commission in February 2000. However, the Paper does not address the GMO problems outlined in this briefing for the following reasons:

(1) Too late - the earliest such a Directive could be transposed into the national law of Member States is 2005, assuming that there are no political delays and industry lobbying. Meanwhile, the biotechnology industry will be operating in the whole of the EU without any effective environmental liability obligations.

(2) It undermines the polluter pays principle by:

- restricting coverage of damage to the environment to a list of so called “dangerous” activities
- forcing the victims, except for dangerous activities, to prove the polluter is liable (ie fault based liability) even though this is a major barrier for those seeking redress for environmental damage
- proposing that liability should be dealt with under a "general framework" thus ignoring the unique nature of GMO pollution, the ability of GMOs to contaminate other life forms and to multiply in the environment.
- ruling out claims for previous damage to the environment
- restricting liability for biodiversity damage only to a small number of

- protected habitats
- requiring 'significant' damage to occur before liability is even acknowledged
- limiting access to justice for public interest groups

(For further detailed comment on the White Paper, see contacts and further reading at the end of this briefing).

International commitments on GMO Liability far in the future

Similarly, international law offers no immediate solution for the liability "gap" in the EU. Article 27 of the Cartagena Protocol on Biosafety signed in Montreal in January 2000 requires that an international liability and redress regime for damage resulting from the trans-boundary movements of Living Modified Organisms be developed within four years of the process commencing. However, the earliest this process could commence is at the end of 2000 meaning that an effective regime is unlikely to be in place before 2004.

National GMO Liability Laws Inadequate

EU Commissioners Bryne and Wallström attempted to defend their opposition to liability being covered by the revised Deliberate Release Directive by pointing to the proposed Environmental Liability Directive and saying that until then "Member States must use national legislation"^v. However, no Member State has an effective comprehensive and specific civil liability regime for GMOs.

[Add your own country information here]

Basic Requirements for GMO Liability

- Any regime should be specific to GMOs and make the biotechnology companies liable for any harm.
- Biotech companies should have sufficient insurance cover to deal with all possible risks and be required to pay into a compensation fund to cover harm where blame cannot be apportioned to individual companies.
- Parties along the supply chain should be able to pass liability claims directly to the biotechnology company which introduced the GM food or crop to the market.
- Liability should be strict (ie not fault based) and the burden of proof should give the benefit of the doubt to the environment and the polluted.

(For more details see further reading at the end of this briefing).

^v EC press conference on 13th July 2000

The Way Forward

It is unacceptable that a new and untried technology, such as GMOs, should be released into the environment and our food chain without it being clear who is liable for any harm. If GM crops and food are so safe why won't the biotechnology industry accept that they should be liable for any harm they cause?

In order to protect the public and the environment from the potential harm of GMOs, Friends of the Earth are calling for the following:

No Liability - No Releases - Continuation of moratorium

✂ All GMO marketing consents should be suspended and no more approved until an effective and specific GMO civil liability legislation is in place.

Liability in the GMO Deliberate Release Directive

✂ The GMO Deliberate Release Directive should be amended to include a clause to make biotechnology companies strictly liable for any harm to the environment and human health. Despite the vote by the European Parliament in April 2000, the conciliation process between the Parliament, Commission and the Council, has the chance to re-instate a clause on liability into the final Directive.

Unilateral action in Member States

✂ In order to protect their citizens governments should pass their own liability legislation if Deliberate Release Directive is not salvaged by common EU action.

Harmonise "Up" in the future

✂ A substantially improved EU environmental liability Directive proposal and a specific international regime under the Biosafety Protocol should look to harmonise "up" the best practice general regimes for the future.

Take Action

Write to your Minister for the Environment to ask them to support a liability clause in the revised Deliberate Release Directive 90/220/EC during the conciliation process.

Write to Caroline Jackson (chair of the European Parliament Environment Committee), Margot Wallström (EU Environment Commissioner) and David Byrne (EU Consumer Affairs Commissioner) asking them to support a strict liability clause in the revised Deliberate Release Directive 90/220/EC.

Write to your MEP asking him/her to support a liability clause during conciliation and to vote for it when the European Parliament approves the final Directive in 2001.

Mrs Caroline Jackson MEP
European Parliament
Rue Wiertz
B -1047 Brussels
BELGIUM

Mrs Margot Wallström
Environment Directorate-General
European Commission
Rue de la Loi 200
B-1049 Brussels
BELGIUM

Mr David Byrne
Health and Consumer Protection Directorate-General
European Commission
Rue de la Loi 200
B-1049 Brussels
BELGIUM

To find out your nearest MEP, check the EU Parliament website at <http://www.europa.eu.int>

All MEPs can be written to at the following address:

[MEP name]
c/o European Parliament
Rue Wiertz,
B-1047 Brussels
BELGIUM

Fifteen minutes writing one letter will add weight to the thousands others are writing. If you've got time, write more than one!

Contacts

[Add your group details here]

Friends of the Earth Europe
29 Rue Blanche
1060 Brussels
Belgium
T: +32 2 542 0180
F: +32 2 537 5596
email: info@foeeurope.org

Further information

Friends of the Earth (England, Wales, and Northern Ireland) submission to European Commission's White Paper on Environmental Liability. Simon McRae June 2000 (available from FOE EWNl at info@foe.co.uk)

FOE Europe Website: <http://www.foeeurope.org/Halt-GMO-Pollution>