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from: Secretary-General of the European Commission,  
signed by Mr Jordi AYET PUIGARNAU, Director

date of receipt: 8 February 2011

to: Mr Pierre de BOISSIEU, Secretary-General of the Council of the European  
Union

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Subject: 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

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Delegations will find attached Commission document SEC(2011) 184 final.

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EUROPEAN COMMISSION

Brussels, 08.02.2011  
SEC(2011) 184 final

**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**

(INDICATIVE LIST OF GROUNDS FOR MEMBER STATES TO RESTRICT OR  
PROHIBIT GMO CULTIVATION)

## 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

#### (INDICATIVE LIST OF GROUNDS FOR MEMBER STATES TO RESTRICT OR PROHIBIT GMO CULTIVATION)

As indicated in the Commission's staff working document of December 2010<sup>1</sup>, the services of the Commission are ready to work with the co-legislators to identify the possible justifications that could be used by Member States under article 26b of the proposal on the possibility for Member States to restrict or to prohibit the cultivation of GMOs in their territory<sup>2</sup>.

Restricting or prohibiting GMO cultivation in part or all of the territory of a Member State may have an indirect effect on free circulation of GM seed that may be considered as an obstacle to free circulation of goods in the sense of Article 34 TFUE<sup>3</sup>. Therefore, the concerned Member State shall ensure that its measure is justified by one of the exceptions to the principle of free circulation of goods referred to in Article 36 TFUE<sup>4</sup>, or any other mandatory requirements as developed by the ECJ or resulting from existing secondary legislation.

In this context, the services of the Commission have identified the following open list of **reasons relating to the public interest** which are either already foreseen in the Treaty or in the existing case-law of the Court of Justice of the European Union or that could be inferred from the terms of the existing secondary legislation, and which could be invoked, alone or where relevant in combination, by a Member State to restrict or prohibit GMO cultivation in all or part of its territory. It is, however, important to underline that the Court of Justice in its case-law has constantly ruled out that free movement of goods cannot be restrained by aims of "a purely economic nature"<sup>5</sup>

- **Public morals** (including religious, philosophical and ethical concerns);
- **Public order;**

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<sup>1</sup> Considerations on legal issues on GMO cultivation raised in the opinion of the legal service of the Council of the European Union (13177/2010, see point 41).

<sup>2</sup> Proposal for a Directive of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for Member States to restrict or to prohibit the cultivation of GMOs in their territory (COM(2010)375 final – 2010/0208(COD)).

<sup>3</sup> *“Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.”*

<sup>4</sup> *“The provisions of Articles 34 and 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.”*

<sup>5</sup> See case C-120/95 Decker, ECR 1998, 1831 (paragraph 39).

- **Avoiding GMO presence in other products**<sup>6</sup>, i.e. contributing to:
  - Preservation of organic and conventional farming systems<sup>7</sup>;
  - Avoiding the presence of GMOs in other products such as particular food products under GM-free schemes;
- **Social policy objectives**, e.g.:
  - Keeping certain type of rural development in given areas to maintain current levels of occupation (such as specific policy for mountain regions);
- **Town and country planning/land use**;
- **Cultural policy**; e.g.:
  - preservation of societal traditions in terms of traditional farming methods;
  - preservation of cultural heritage linked to territorial production processes with particular characteristics;
- **General environmental policy objectives, other than assessment of the adverse effects of GMOs on environment**; e.g.:
  - Maintenance of certain type of natural and landscape features<sup>8</sup>;
  - Maintenance of certain habitats and ecosystems (i.e. preservation of the conservation status quo);
  - Maintenance of specific ecosystem functions and services<sup>9</sup> (e.g. preservation of nature-oriented regions of particular natural and recreational value to citizens);

These justifications can be used, alone or in combination, depending on the particular circumstances of the Member State/region/area in which the restriction/prohibition measure will apply. However the sole invocation of one or several of these justifications in abstract terms will not be sufficient to meet the scrutiny of the Court of Justice of the European Union. The measure should also be **justified, proportionate** and **non discriminatory**.

Finally, the services of the Commission would like to clarify that the proposed justifications and examples that are provided in this document are only indicative and do not constitute an

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<sup>6</sup> Restrictions or prohibition measures may be justified under this example when other less restrictive measures are not sufficient to avoid the unintended presence of GMOs in other products, as mentioned in Commission Recommendation of 13 July 2010 on guidelines for the development of national co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops (2010/C 200/01).

<sup>7</sup> This example could also be justified under "Town and country planning/land use", "Cultural policy" and/or "Social policy objectives"

<sup>8</sup> This example could also be justified –depending on the circumstances- by "town and country planning/land use" justifications.

<sup>9</sup> Ecosystem functions and services can be defined as those ecological or ecosystem processes or functions that have value to individuals or to society (e.g. flood prevention, erosion prevention, regulation of water, air and climate, food production or intrinsic value to citizens).

exhaustive list of possibilities that may be invoked by a Member State to justify a national measure restricting/prohibiting the cultivation of GMOs in a given area. Moreover, some of the examples listed under one specific justification might also fall to some extent under one or more justification depending on the particular circumstances of the Member State/region/area.

It is important to finally note that only the Court of Justice of the European Union is entitled to provide final interpretation of EU legislation.