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Subject : Proposal for a Regulation of the European Parliament and of the Council
amending Directive 2001/18/EC as regards the possibility for the Member States
to restrict or prohibit the cultivation of GMOs in their territory
- Progress report

I. INTRODUCTION

The Council Conclusions of 4 December 2008 identified particular areas for improvement of the implementation of the comprehensive EU legal framework for the authorisation of Genetically Modified Organisms (GMOs) entailing work by the Commission and EFSA as well as from Member States. The following areas were identified: the strengthening of environmental assessment and of monitoring arrangements; the appraisal of socio-economic benefits and risks; the better use of expertise; the European labelling thresholds for seeds; the sensitive and/or protected areas.

On 13 July 2010 the Commission proposed a new GMO package aiming to confer to Member States the freedom to restrict or ban the cultivation of Genetically Modified Organisms (GMOs) on part or all of their territory, while keeping unchanged the existing EU science-based authorisation system. The said package consists of a Communication and a draft Regulation proposing a change to the Directive 2001/18/EC to allow Member States to restrict or prohibit the cultivation of GMOs in their territory. The accompanying Commission Recommendation on co-existence allows more flexibility to Member States to take into account their local, regional and national conditions when adopting co-existence measures.

Directive 2001/18/EC would be amended to include an Article 26b allowing Member States to restrict or prohibit the cultivation in all or part of their territory of a GMO or GMOs authorised at European level under the Community provisions in force. The restricting or prohibiting measures must be based on grounds other than those related to the adverse effect on health and environment and must be in conformity with the Treaties.

The new recommendation on co-existence allows Member States greater flexibility in the development of national co-existence measures and allows them to define GM-free areas.

The creation of an ad-hoc Working Party was decided by the Committee of Permanent Representatives, considering the specificity of the topic and the need to consider all its different aspects, in order to allow an integrated examination of the proposed package on GMOs, taking into account its agricultural, environmental, economic and legal aspects. The mandate of the Working Party is to examine the Communication and the draft Regulation and to consider all its different aspects, while taking into account the accompanying Commission Recommendation on co-existence. The ad-hoc Working Party started its activity in September 2010 taking over from the Working Party on the Environment. It must regularly report to COREPER with a view to prepare the work of the Council.

II. STATE OF PLAY

The Working Party met on 17 September and 11 November (following a single meeting of the Working Party on the Environment on 27 July).

It allowed identifying the main issues and concerns of delegations:

- Most delegations considered that the proposal was not an adequate response to the 2008 Council Conclusions which need to be fully implemented;
- A large number of delegations underlined the need to clarify the mechanism and the acceptable grounds for restricting, refusing or banning the cultivation of GMOs in specific Member States;
- Several delegations were doubting that the draft regulation proposed by the Commission provide the Member States with a workable and legally sound option with regard to the Treaties to restrict or prohibit the cultivation of GMOs on their territory;
- Several delegations were concerned on the consequences of the proposed system in relation to the international trade-related legal framework, in particular regarding potential WTO challenges brought up against specific Member States;
- Some delegations questioned the choice of the legal basis (Article 114 TFEU) chosen for the proposal;
- Some delegations expressed concerns regarding the impact on the internal market of the proposal, in particular regarding the impact of the new proposals on farmers and possible distortion of competition;
- Some delegations questioned the effects of the proposed system on the seeds market.

An exchange of views at ministerial level was held in closed session at the Council (Agriculture and Fisheries) of 27 September on the communication accompanying the legislative proposal. It focused on the economic impact; on the internal markets and on the steps to be taken to ensure that the Commission proposals comply with WTO rules and internal market rules.

An exchange of views at ministerial level was held in public session at the Council (Environment) of 14 October on the legislative proposal. It focused on the articulation of the package adopted by the Commission in July and the requests made by the Council (Environment) in December 2008 and on the Member States possibility to restrict or prohibit the cultivation of GMOs on their territory on the basis of the proposed legislative modification in a workable and legally sound way.

During both exchanges of views in the Council, many Member States have confirmed the questions and the doubts already expressed at the technical level in the ad-hoc Working Group. Some Member States clearly rejected the current proposal. Moreover, a number of EU trade partners and other stakeholders have expressed their concerns regarding this proposal.

The opinion of the Council legal service was requested on the legal basis and on the possible national measures with regard to both EU law and GATT.

In its opinion, the Council legal service (doc. 15696/10) reaches the following conclusions:

- the proposal as it stands is not validly based on Article 114 TFEU;
- there would be strong doubts about the compatibility with the Treaties or with the GATT of any measures the Member States might adopt in reliance upon the new Article 26b of Directive 2001/18, in the form that would result from adoption of the present proposal.

The legal opinion was welcomed by delegations, while the Commission strongly disagreed¹ with the opinion's conclusions stating that in its view:

- its proposal is validly based on Article 114 TFEU and;
- is compatible with WTO law and that it can not be concluded *in abstracto* and in aprioristic manner that there are strong doubts that any measures to be adopted by the Member States on the basis of the proposal would be compatible with the Treaty and the GATT.

¹ These considerations are confirmed in a Commission staff working document (doc. 16826/10).

The general position of delegations towards the Commission legislative proposal differs:

- Some delegations are rather positive or cautiously positive to the Commission proposal noting that it represents a step forward into the GMO issue, even if many of them indicated that work still needs to be done;
- Several delegations find the proposal premature or consider that deliverables called for by the Council in its 4 December 2008 Conclusions are needed in order to frame a possible discussion on the draft regulation.
- Many delegations consider that the production by the Commission of a list of grounds on which Member States could base their decision to restrict or ban GMO cultivation is a prerequisite for further work on the proposal;
- Some delegations reject the proposal outright or express deep reservations for various reasons (on legal grounds or because it is deemed to be detrimental to the internal market or to the common agricultural policy or by questioning the legality with GATT rules).

On 8th of December, the COREPER held an exchange of views aiming to provide guidance for the future work in relation to this dossier on the basis of a report prepared by the Presidency (doc. 17442/10).

This exchange of views showed that a majority of delegations are willing to carry on with the discussions on the draft regulation, *inter alia*, to clarify the legal aspects. However, an even larger majority of delegations consider that prerequisites should be met before discussions could continue. These prerequisites are the implementation of the 4 December 2008 Council Conclusions and the production by the Commission of a list of grounds which could be used by the Member States to either restrict or ban the use of GMOs on their territories. Until these prerequisites are met, work of the ad-hoc working party on GMOs cannot be pursued in a fruitful manner.

It should also be noted that a group of delegations – constituting a blocking minority – consider that the examination of the proposal should not be pursued.