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Delegations will find attached Commission document SEC(2011) 551 final.

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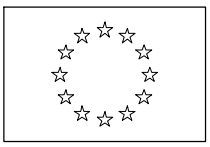

EUROPEAN COMMISSION

Brussels, 29.4.2011
SEC(2011) 551 final

COMMISSION STAFF WORKING PAPER

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 - WTO COMPATIBILITY

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1. Introduction

In a first staff working document dated December 2010[1] the Commission' services provided, *inter alia,* general considerations concerning the compatibility with WTO of possible national measures adopted by Member States on the basis of Article 26b of Directive 2001/18/EC, as resulting from the proposal of the Commission to the European Parliament and to the Council (COM(2010)375 final[2]). This staff working document was published in reaction to an opinion of the Council legal service dated 5 November 2010[3], which was followed by an opinion of the European Parliament legal service dated 17 November 2010[4].

On 30 March 2011, the Commission' services provided the ad hoc working party on GMOs with a detailed analysis of the interpretation and the interrelationship between Article III:4 and Article XX of the *GATT*, and outlined, in abstract terms, the possibilities offered by these provisions to defend WTO compliance of national measures adopted by the Member States on the basis of the above-mentioned proposal of the Commission. However, they indicated that the analysis of the application of the law in any particular case is necessarily based on the surrounding facts of each individual measure that could be adopted in the future and which are not yet known. At this occasion, the Commission' services also confirmed that, in accordance with Article 207 TFUE, it will continue to ensure the defence of any complaint against measures adopted by a Member State in this area before WTO dispute settlement bodies.

Upon request of several Member States, the Commission' services have agreed to reflect in writing the considerations presented at the ad-hoc working party meeting on 30 March 2011. The present staff working document addressed to the co-legislators delivers on this commitment.

2. Analysis

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1 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).

2 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)).

3 15696/10.

4 SJ-0630-10.

1. All regulatory differences between WTO Members, even measures providing for neutral treatment of imported and domestic products, potentially affect the way that trade flows between WTO Members.

2. The WTO Agreement does not require full international harmonisation, but leaves some regulatory space or autonomy to individual WTO Members. Thus, it provides specific legal rules for *balancing* the trade interest and the regulatory interest.

3. In the exercise of that regulatory autonomy, the European Union has different regulatory approaches to non-GMOs and GMOs (the regulations relating to the latter being in some respects more restrictive), although all such regulations provide for neutral treatment of imported and domestic products.

4. Article III:4 of the *GATT* requires an imported product to be not less favourably treated than the domestic like product. In order to apply this provision it is necessary to identify both the imported product and the domestic like product.

5. If the imported product is the GMO, the domestic like product is the GMO; if the imported product is the non-GMO, the domestic like product is the non-GMO; and if the imported product is the good whether or not GMO, then the domestic like product is the good, whether or not GMO. One can think of these as three horizontal lines.

6. Having identified both the imported product and the domestic like product, it is necessary to consider whether or not the measure provides for less favourable treatment of the imported product compared to the domestic like product.

7. There is a distinction between "in law" and "in fact" breaches of Article III:4 of the *GATT*. In an "in law" breach the less favourable treatment of the imported product compared to the domestic like product is expressly stated on the face of the measure. In an "in fact" breach the measure is facially neutral as between the imported product and the domestic like product, but the complaining Member nevertheless asserts a breach based on: 1) the alleged trade restrictive effects of the measure; 2) the alleged aim or objective of the measure; and 3) other facts alleged to be relevant to a breach.

8. It is assumed that none of the measures to be adopted will, on their face, treat the imported product less favourably than the domestic like product[5]. That is, there will be no "in law" breach of Article III:4 of the *GATT*. Rather, there might be a claim of an "in fact" breach of Article III:4.

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[5] As explicitly underlined in recital 7 of the proposal, measures adopted by Member States on the basis of Article 26b of Directive 2001/1/EC *"should refer to the cultivation of GMOs only and not to the free circulation and import of genetically modified seeds and plant propagating material, as or in products, and of the products of their harvest."*

9. In such a context, it is quite possible that a complaining Member would adopt the following line of argument: the imported GMO product is like the domestic non-GMO product (one can think of this as a diagonal line); the regulation of the (imported) GMO product is more restrictive than the regulation of the (domestic) non-GMO product; therefore the imported product is treated less favourably than the domestic like product, so there is a breach "in fact" of Article III:4. The problem with this line of argument is that it erroneously assumes that, in the case of like products, there is no regulatory autonomy, other than for the reasons enumerated in Article XX of the *GATT*. The Appellate Body has indicated that this approach is not correct.[6] In effect, it would oblige the importing Member to admit products based on the regulatory approach of the exporting Member, and ultimately to align its domestic regulation on that of the exporting Member. This may engender a so-called "race to the bottom": the least costly most deregulated approach is effectively exported by one WTO Member to all the others.

10. The defence to such a claim would involve arguing that the "diagonal line" approach is not an adequate methodology for determining whether or not there is a breach "in fact" of Article III:4. Rather, it is necessary to consider all the facts. Those facts include the stated objectives of the measure. It is at this point that the list of potential objectives may come into play. The defensive argument would be that: 1) these are the real objectives (not trade restriction or protectionism); 2) that these objectives are legitimate; 3) that the measures reasonably contribute to achieving the stated objectives; 4) that the alleged trade restriction is no more than the temporary trade shock engendered by all regulatory change; and 5) that the measures are the least trade restrictive measures available that reasonably contribute to achieving the stated objectives. In this context, the list of potentially legitimate objectives is open, and is not limited to the matters expressly identified in the general exceptions set out in Article XX of the *GATT*.

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[6] Appellate Body Report, *EC-Asbestos*, paragraph 100: "… a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products."; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, paragraph 96: " … the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product …". See also: Panel Report, *EC-Approval and Marketing of Biotech Products*, paragraphs 7.2408 and 7.2511 (citing the earlier Appellate Body reports): "Reading Annex C(1)(a), second clause, in the light of the jurisprudence on Article III:4, we consider that in undertaking and completing its approval procedures, a Member may, in principle, differentiate between products that have been found to be like because this would not, by itself, mean that the relevant approval procedures have been undertaken or completed in less favourable manner for the group of like imported products than for the group of like domestic products. In particular, a mere showing that a Member has undertaken or completed a particular approval procedure in a manner which is unfavourable for a given imported product would not be sufficient to establish a "less favourable manner" of undertaking or completing approval procedures if the relevant Member's conduct is explained by factors or circumstances unrelated to the foreign origin of the product." The earlier Appellate Body reports are also cited with approval in Panel Report, *EC-Trademarks and Geographical Indications (US)*, paragraph 7.182 and footnote 202.

11. This approach complements and does not diminish in any way the argument that the GMO product is not like the non-GMO product.