

# **E**uropean **L**andowners **O**rganisation

## **GENETIC MODIFICATION IN AGRICULTURE**

### **INTRODUCTION**

This spring, the debate about genetically modified organisms (GMOs) has intensified as both media and public concern have strengthened. In particular there is no clear scientific consensus as to the pros and cons: in effect 'the jury is still out'. However, with supermarkets and food manufacturers across Europe now responding to public opinion by announcing phase-outs of GM products within their 'own-brand' products, the development of non-GM markets is likely, whatever the science. This could have land management and valuation implications, which are outlined beneath. An ELO line on GMOs was developed at the December meeting of the Policy Group (EPG 65/98) and is further refined in this paper to take into account both environmental liability issues and the impact on land values of growing GM crops. The paper begins by detailing the current state of play on EU legislation regarding GMOs.

### **PROGRESS OF DIRECTIVE 90/220 ON 'DELIBERATE RELEASE OF GMOS INTO THE ENVIRONMENT'**

A new Presidency compromise paper (a revised Commission Proposal) on revisions to Directive 90/220 on the "deliberate release of GMOs into the environment", is to be tabled at COREPER this month. The Commission hopes that a common position will be reached by Member States at the June Agriculture Council.

When the European Parliament finally gave its Opinion on the Directive back in February, it proposed the following amendments:

- (i) The introduction of a Producer Liability system for damage to human health or the environment.
- (ii) Compulsory labelling of all GMOs authorised for release and a description of the content of the new product.
- (iii) An increase in the authorisation period for consents to place GMOs on the market to 12 years (instead of the 7 years proposed by the Commission).

However the Commission seems intent on only agreeing certain amendments to its original proposal including the adoption of the precautionary principle, a certification scheme to ensure traceability and the establishment of an ethics committee. It rejected the amendment extending the authorisation period from seven to twelve years. It also rejected the proposal for a civil liability regime for companies. The ELO remains concerned that producers may be held responsible in respect of future liability for harm to human health or the environment. This is because:

- (a) The Product Liability Directive will extend liability for primary agricultural products and, despite ELO lobbying, liability will not extend back up the chain to the companies producing the inputs, but will stop with farmers.
- (b) A White Paper on civil liability for environmental damage is expected sometime after the new Commission has taken up office.

## **ELO LOBBYING**

It remains unclear how liability regimes will apply in practice in the case of GM crops and 'who will be liable for what' damage arising from GM crops. This is one area in which EU policy on GMOs is lacking and it is not dealt with by the Committees approving GM products for release.

The ELO is concerned about the potential liability for the landowner or farmer associated with possible 'harm' (eg. health or environmental) arising from GM products. There needs to be a clause in both the EU's Product Liability Directive and Directive 90/220 which enables liability to be passed further up the chain to the innovators of GM seeds and inputs, rather than stopping at the farmer.

Producers could also be subject to significant deleterious economic impacts associated with the cross-contamination of GM versus non-GM crops, as illustrated by the following two cases:

(i) The case of the organic tortilla chips – highlighted in the UK press on 4 February – which had to be recalled following the discovery that GM maize had cross-pollinated with non-GM maize. Who would pay the costs of recall and cleanup? Is this the job of insurance companies and will they continue to pay such costs once scientific evidence indicates that cross-contamination is possible, even at great distances?

(ii) The second case illustrates how land management implications may arise when crop certification/assurance contracts could be jeopardised by the possibility of cross-contamination: the UK Court of Appeal case *Regina v Secretary of State for the Environment and MAFF ex parte Watson* highlighted how the cross-contamination of organic crops could lead to the loss of certification contracts.

## **ELO ADVICE TO MEMBERS CONSIDERING GROWING GM CROPS, WHETHER THEY ARE TRIALS OR COMMERCIAL RELEASES**

The Policy Group has noted recent CLA Briefing Notes on GMOs (Refs: A 06/99 and A 12/99). The text beneath identifies potential liabilities and prudent steps that should be taken to protect members' position.

*Whilst scientific opinion is split as to the costs and benefits of GMOs, there is a body of opinion that potentially these organisms are hazardous. If GMOs do prove to be problematic, it is possible that landowners will face claims in contract and/or tort. In addition, the Product Liability Directive 1985 is at present under review, and is likely to be amended to remove the exclusion for primary agricultural products, such as wheat. The result of this will be that a consumer who suffers damage because of the state of a primary agricultural product, would be able to bring a claim against the farmer direct. The liability is strict in that the consumer would not need to prove fault on the part of the producer, only that the product caused damage. It is, at present, a defence to a claim to show that the state of scientific knowledge at the relevant time was not such that a producer might be expected to have discovered the defect in the product. However, it is unclear whether this defence could be relied on, given that scientific opinion is split as to the safety of GMOs. Further, at present consumer groups are lobbying for removal of this defence, and the entire Directive is due to be reviewed in 2000. In addition, if GMOs contaminate land clearly this would have an effect on the*

value of the property, as well as raising the possibility of service of a remediation notice requiring monies to be spent on clean up.

**As such, members are strongly advised to:**

- (a) take independent specialist legal advice regarding their potential liability under national and European Law prior to growing GMOs;**
- (b) take professional advice as to the possible short and long-term valuation and environmental implications of growing GMOs on land;**
- (c) ensure that they have the permission of all affected third parties, such as mortgagees, to use GMOs;**
- (d) incorporate a clause in all tenancy agreements prohibiting the use of GMOs without the landlord's permission.**
- (e) seek an indemnity from the GMO supplier for all losses, including pure economic loss.**

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