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to:	Mr Javier SOLANA, Secretary-General/High Representative
Subject:	Recommendation from the Commission to the Council on the participation of the European Community in negotiations on genetically modified organisms under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, including the 2nd Meeting of the Parties to be held in Almaty, Kazakhstan, 25-27 May 2005

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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 10.02.2005
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RECOMMENDATION FROM THE COMMISSION TO THE COUNCIL

on the participation of the European Community in negotiations on genetically modified organisms under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, including the 2nd Meeting of the Parties to be held in Almaty, Kazakhstan, 25-27 May 2005

A. EXPLANATORY MEMORANDUM

Introduction

1. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (hereinafter referred to as the Convention), was signed by the Community and its Member States in 1998. A proposal for a Decision to conclude the Convention, on behalf of the European Community has been submitted to the Council on 24 October 2003[1].

2. The Convention addresses public participation relating to decision-making on deliberate release of genetically modified organisms (hereinafter GMOs) in its Article 6 paragraph 11. This provision requires Parties to apply, within the framework of their national legislation, the public participation provisions set out in article 6 to decisions on whether to permit deliberate release of GMOs to the extent feasible and appropriate.

3. Article 6 paragraph 11 of the Convention is given effect in the Community by means of provisions made within Directive 2001/18/EC of 12 March 2001 on the deliberate release into the environment of GMOs[2] and Regulation (EC) No 1829/2003 of 22 September 2003 on genetically modified food and feed[3]. Directive 2001/18/EC is a full harmonisation Directive, based on Article 95 of the Treaty.

4. In such circumstances, where Community rules have been established for the attainment of the objectives of the Treaty, Member States cannot assume obligations outside the framework of Community institutions which might affect those rules or alter their scope.

The problem and the way forward

5. When the Aarhus Convention was adopted in June 1998, the Signatories requested the first meeting of the Parties to further develop the application of the Convention in the field of deliberate release of GMOs, possibly by means inter alia of more precise provisions. It is important to note that, at the time the wording of Article 6 paragraph 11 was agreed in 1998, it took into account the uncertainty with regard to the negotiations of a Protocol on Biosafety to the Convention on Biological Diversity. In the mean time, the Cartagena Protocol (hereinafter referred to as the Protocol) was signed in 2000 and entered into force in 2003.

6. In response to this, the first meeting of the Signatories established in 1999 a task force on GMOs to prepare a report summarizing the experience of implementing the provisions of article 6, paragraph 11 of the Convention, as well as relevant international processes and developments, and to make recommendations for further action. The task force explored various options for developing the application of the Convention in the field of decision-making on GMOs, including a decision of the Parties, guidelines, an amendment of the Convention and the development of a

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1 COM(2003)625
2 OJ L 106, 17/04/2001 p. 1 - 39
3 OJ L 268, 18/10/2003 p. 1 - 23

protocol or an annex on GMOs. The issues of contained use and labelling were also discussed.

7. The work of the task force led to the establishment of a first working group on GMOs, which met on three occasions in 2001-2002. The Working Group followed two-track approach, exploring both legally binding and non-legally binding options. With respect to the latter, guidelines on public participation in decision-making on GMOs have been prepared and were adopted by the 1st Meeting of the Parties, in October 2002. With respect to the legally binding track, no agreement was reached. The 1st Meeting of the Parties established a second Working Group on GMOs to continue work in the field. This group met on four occasions in 2003-2004.

8. In accordance with the mandate given by the 1st Meeting of the Parties, in its Decision I/4, the 2nd Aarhus Working Group on GMOs has now concluded its technical work, consisting in identifying and developing potential options to strengthen Aarhus provisions on this subject. This technical group will report to the 2nd Meeting of the Parties (Kazakhstan, May 2005), which will decide on the way forward.

9. Five options are now on the table. Four of them consist in amending the Convention in order to reinforce the obligations put on Parties for public participation in GMO decision making processes. The first option covers all GMO related activities, including contained use, and provides for the full application of the provisions of Article 6 paragraph 2 to 10 of the Convention to GMOs and the deletion of Article 6 paragraph 11. The second option also covers all GMO related activities, but offers slightly more flexibility by allowing for a "differentiated approach", where Parties can, under certain conditions, maintain their existing legislation, and by excluding those provisions of 6 paragraphs 2 to 10 of the Convention which are not tailored to GMOs. The third option would only apply to deliberate release and placing on the market of GMO, and merges relevant provisions of the Convention and of Directive 2001/18/EC. The fourth option would also only apply to deliberate release and placing on the market of GMO, and consist in a general obligation to promote public participation in GMO decision making, with a cross-reference to the Protocol. The fifth "not legally binding" option would leave the Convention unamended and relies on provisions to be developed under the national law of the Parties and non-binding instruments to ensure public participation in the field of GMOs.

Considerations in relation to the options under discussion

10. GMOs have so far always been given a special treatment under the Convention. For example, the Convention was never conceived to cover scientific experimentation (a "Part B" release of a GMO would be excluded from its scope in accordance with Annex I paragraph 21) or product approval (article 6(1)(a) and Annex I to the Convention relates to specific activities and targets industrial installation from a certain level of emission and large scale transport infrastructure and Article 6(1)(b) is to be interpreted as covering other infrastructure-related activities, which would de facto exclude "Part C" placing on the market of a GMO). Article 6 and Annex I of the Convention are inspired from the Espoo Convention and the Integrated Pollution

Prevention and Control (IPPC)[4] and Environmental Impact Assessment (EIA)[5] Directives, and thus, some of their wording is clearly irrelevant in the context of the release of GMOs (i.e. "transboundary impact assessment", "emissions"), both in relation to Community rules or, more importantly, to the Cartagena Protocol on Biosafety. These considerations clearly dismiss the option of simply deleting Article 6 paragraph 11 and adding GMOs to the list of activities of Annex I to the Convention. On the contrary, they impose the development of "ad-hoc" wording as well as, if a legally binding option was to be agreed upon, an independent Article or/and Annex in the Convention.

11. The Community has built up a considerable body of law over the last five years to comply with the relevant international agreements in the field of biotechnology and of public participation, which are respectively the Protocol and the Convention.

12. The consequences of an amendment at this stage of the Convention have to be carefully weighted. Firstly, consistency between Community and international regulatory framework has to be secured. Relevant existing Community legislation is only applicable since October 2002, and has not yet been implemented by all Member States. Some of the options proposed by the Working Group on GMOs, in particular the first option, would impose a modification of current Community legislation, in codecision procedure, as well as of national measures of transposition. This will put a considerable burden on the Commission and on Member States, and further deprive the European Union from a complete and operational legal framework in the field of biotechnology, with potential negative consequences in the context of the WTO.

13. In addition any significant change to the Convention at this stage may hinder ratification by signatories to the Convention, or significantly delay its practical implementation. It would be counter productive that the discussion related to GMOs eventually acts as a source of delay in the ratification and implementation of the Convention by the Parties. In case the Community (and probably several Member States) has not ratified the Convention at the time of the 2nd Meeting of the Parties, any amendment might have negative implications for the ratification process. The need to avoid such a situation is a further reason to seriously consider the overall necessity to amend the Convention at this stage and to oppose any amendments that would significantly alter the core of the Aarhus Convention or require changes in Community law.

14. Furthermore, the European Union has invested huge energy in the adoption, implementation and further development of the Protocol. In this context, GMO discussions under the Convention should not prejudge or duplicate upcoming discussions under the Protocol, as the latter is the international agreement specific to GMOs and has a broader audience. On the contrary, synergy and mutual supportiveness between those two international instruments have to be promoted. It is also important to point out that most of the needs expressed by the Central/Eastern

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4 Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control, OJ L 257, 10/10/1996 p. 26 - 40

5 Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ. L 73, 14/03/1997 p. 05 - 15

Europe, Caucasus and Central Asia countries (hereinafter the "EECCA") in the discussions on GMOs under the Convention rather relate to the absence of a national framework on biosafety than to the lack of public participation procedures.

15. In the light of the above, the Presidency has invested remarkable efforts ahead of the final Meeting of the Working Group on GMOs to develop "common views", which were unanimously supported by Member States and the Commission, and have enabled successful Community coordination in a difficult negotiating context. It is the purpose of the present Recommendation to follow the spirit of the "common views" in the upcoming negotiation on GMOs under the Convention, including the 2nd Meeting of the Parties, and to ensure that, by speaking with a single voice the European Union achieves a result which is consistent with Community and international law and contributes to promoting synergy between international agreements.

Conclusion

16. The Commission invites the Council to authorise the Commission to negotiate in the name of the Community on matters falling under Community competence, particularly on deliberate release and placing on the market of GMOs.

B. RECOMMENDATION

In the light of the above, the Commission recommends that:

a) the Council authorises the Commission to participate, on behalf of the European Community, on matters falling under Community competence, in the negotiations on genetically modified organisms under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, including the 2nd Meeting of the Parties;

b) the Commission conducts these negotiations on behalf of the European Community in consultation with a special committee of representatives of Member States, in Brussels or on the spot in accordance with the negotiating directives set out bellow;

c) to the extent that the agreement falls partly within the competence of the Community and partly within the competence of Member States, the Commission and the Member States should cooperate closely during the negotiation process, in view of aiming for unity in the international representation of the European Community, and;

d) the Council issues the appended negotiating directives.

C. NEGOTIATING DIRECTIVES

1. The position of the Community, to be represented by the Commission, in the upcoming negotiation on GMOs under the Convention, including the 2nd Meeting of the Parties, shall be in accordance with the positions contained in Annex I to this Decision.

2. The Commission shall ensure that the decisions adopted by the 2nd Meeting of the Parties are consistent with relevant Community legislation, particularly on deliberate release and placing on the market of GMOs.

3. The Commission shall report to the Council on the outcome of the negotiations and, where appropriate, on any problem that may arise during the negotiations.

ANNEX I

1. The European Union has unanimously agreed to a set of "common views" developed by the Presidency in cooperation with the Member States and the Commission, and which have provided for guidance during the negotiation having taken place at the final Meeting of the Working Group on GMOs. Those common views are still valid, and in particular the elements bellow;

2. The European Union already has a legal framework on information and consultation of the public on GMO decision making, which is in compliance with Article 6 paragraph 11 of the Convention. There is only limited experience with this framework and thus no reason to change it for the time being. There is no obligation to amend it under present circumstances. The Community should therefore not take the initiative to suggest an amendment to the Convention, and if such an amendment was to be decided, it needs to enable the EU to maintain its legislation unamended;

3. The European Union applies a different decision making procedures for experimental release of GMOs (so called "Part B") and placing on the market of GMOs (so called "Part C") under Directive 2001/18/EC and Regulation (EC) 1829/2003. It is impossible for the EU to adopt similar detailed rules on public information and consultation for those two types of activities. A "Part B" release is of local interest, and procedurally fully under the competence of the Member State where the release is taking place, whereas a "Part C" release is of Community interest, and procedurally under the responsibility of the Commission and the 25 Member States. If an amendment to the Convention was to be decided, it will have to be sufficiently flexible and general to enable the EU to maintain the specific procedures of Community legislation;

4. Given the specificity of the contained use of GMOs, notably characterised by the setting up of measures to prevent the contact of such activities with the environment, it shall be excluded from the scope of any possible legally binding option. In addition to this, many contained use activities relate to scientific experimentation, and also quite often concern single operation of a small volume, which clearly contrasts with the type of activities targeted by the Convention. Finally, the rules on public consultation on the contained use of GMOs significantly vary from one Member State to the other, making any harmonised approach cumbersome;

5 It needs to be avoided to reopen other aspects of the Convention via the discussion on GMOs. Any amendment of the Convention should not cause changes in its scope, nor in the requirements applicable to activities that fall under its current scope. Thus, from this perspective, the development of "ad-hoc" wording as well as, if a legally binding option was to be agreed upon, an independent Article or/and Annex in the Convention appears preferable to an amendment of Article 6 and/or Annex I;

6. The European Union recalls that the Protocol is, since its entry into force on 11 September 2003, the key international agreement in the field of GMOs, and that parallel discussions in the framework of the Convention shall avoid duplication and promote synergies. The Convention can however provide for a useful contribution to the implementation of article 23 of the Cartagena Protocol. This can be done in the

context of the medium-term programme of work relating to public participation, which is set to start at the second ordinary meeting of the Parties to the Protocol later in 2005;

7. Furthermore, the European Union would like to emphasise that early ratification or accession to the Protocol will provide for legally binding international obligations on participation in GMO decision-making, as well as respond to the overarching needs expressed by several countries for a national biosafety framework. Such a framework includes risk assessment and decision procedures and facilitates participation in capacity-building programmes, particularly in the context of the UNEP Global Environment Facility;

8. Consequently, the European Union:

– considers that there is no need for new provisions on GMOs in the Convention and can hence support the option to leave the Convention unamended and to rely on initiatives taken by the Parties individually and non-binding instruments to provide for public consultation in the field of GMOs;

– sees an interest in reinforcing synergy between international agreements and could support an amendment to the Convention consisting in an independent Article/Annex stipulating a general obligation to promote public participation in decision making on the deliberate release and placing on the market of GMO, with a cross-reference to the Protocol;

– questions the added value of duplicating efforts in international fora by developing an amendment to the Convention containing very detailed provisions on public participation in decision making on the deliberate release and placing on the market of GMO inspired from relevant provisions of the Convention and of Directive 2001/18/EC, while recognising the efforts undertaken to ensure consistency of such an option with Community and international legislation;

– rejects the options consisting in amending the Convention in a way to fully or partially apply Article 6 paragraphs 2 to 10 to all GMO related activities, including contained use.