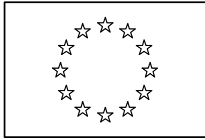

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COMMISSION STAFF WORKING DOCUMENT

CONSIDERATIONS ON LEGAL ISSUES ON GMO CULTIVATION RAISED IN THE OPINION OF THE LEGAL SERVICE OF THE COUNCIL OF THE EUROPEAN UNION OF 5 NOVEMBER 2010

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1. INTRODUCTION

1. The proposal amends Parliament and Council Directive 2001/18/EC on the deliberate release into the environment of genetically modified organisms[1], by inserting a new Article 26b which would provide the Member States a legal base to adopt <u>if they wish</u> measures restricting or prohibiting the cultivation of all or particular GMOs authorised in accordance with Part C of this Directive or Regulation (EC) No 1829/2003 in all or parts of their territory, <u>subject to the respect of certain conditions</u>. These conditions are the following:

   (a) those measures are based on grounds other than those related to the assessment of the adverse effect on health and environment which might arise from the deliberate release or the placing on the market of GMOs; and,

   (b) that they are in conformity with the Treaties.

   By way of derogation to Directive 98/34/EC, Member States that intend to adopt reasoned measures under this Article shall communicate them to the other Member States and to the Commission, one month prior to their adoption for information purposes."

2. The proposal also states in its recital 7 that *"measures should refer to the cultivation of GMOs 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. Similarly they should not affect the cultivation of non genetically modified varieties of seed and plant propagating material in which adventitious or technically unavoidable traces of authorised GMOs are found."*

3. This Article will be inserted in Part D of Directive 2001/18/EC which is applicable both to GMOs authorised under Directive 2001/18/EC and under Regulation (EC) 1829/2003[2]. Other provisions of the existing legal framework on GMOs (including the system of authorisation prior to the placing on the market, safeguard measures/emergency measures as well as the provisions on free circulation) would remain untouched by the proposal.

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[1] Throughout this opinion the abbreviations "GM" and "GMO" are used to indicate, respectively, "genetically modified" and "genetically modified organism".

[2] See point 10 of the Council's Legal Service opinion which refers to the "passerelle" between the Directive and the Regulation.

4. The ad hoc working party established by COREPER to examine the above mentioned proposal raised several legal issues, to which the Legal Service of the Council was asked to respond in writing. These issues related to the choice of legal basis for the proposal, type of national measures that could lawfully be adopted by the Member States on the basis of the proposal, and the compatibility of any such measures with the GATT.

5. In the ad-hoc Working Party dated 11 November, the Council's Legal Service presented its opinion dated 5th November 2010 whereby it responded to the above mentioned issues and concluded that:

– *"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."*

6. On the occasion of the ad-hoc Working Party of the 11 of November, the Commission's representatives outlined the reasons why the Commission's services disagrees with these conclusions, and with the main legal reasoning provided in support thereof. They agreed to communicate these elements to the ad-hoc Working party in writing before the end of the November.

7. The present document - which takes the form of a Commission staff working paper –honours this commitment. As explained by the Commission's representatives during the ad-hoc Working party on 11 November, the present document aims only at providing the delegations participating to the ad hoc Working Party with a current position of the Commission's services on the Council Legal Service's Opinion dated 5th November 2010. It is not intended to take a position on all possible justifications that could be used by Member States to support a measure based on the proposed Article 26b of Directive 201/18/EC when applicable. This last point will be subject to further discussion in the ad-hoc Working Party as well as in the relevant committees of the European Parliament, with active participation of the Commission's services.

2. LEGAL BASIS OF THE PROPOSAL

8. The legal basis of the proposal is Article 114 TFUE on the approximation of the provisions laid down by regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

9. This Article of the Treaty is the legal base of Directive 2001/18/EC.

2.1. Council Legal Service's main arguments

10. The Council's Legal Service argues in essence that Article 114 TFUE could only be used to "disharmonize" an area if the amendment based on Article 114 improves[3] the functioning of the internal market (see point 20 and 21 of the opinion).

11. The Council's Legal Service refers to the Court's case law in this respect. If a "*Directive genuinely has as its object the improvement of the conditions for the functioning of the internal market and [if] it was, therefore, possible for it to be adopted on the basis of Article 95 EC,[...] it is no bar that the protection of [another imperative] was a decisive factor in the choices involved in the harmonising measures which it defines*".[4]

12. However it concludes in point 23 that it is not *"apparent that any justification having to do with a problem, actual or potential, in the functioning of the internal market of the relevant products was decisive in the adoption of the Commission's proposal"*.

13. The Council's Legal Service finally adds that "*this does not mean that the legislator could not justify the adoption of the act on the basis of Article 114 TFEU by reasons related to the functioning of the internal market, even if these have not been invoked in the presentation of the proposal. It is to be noted in this respect that the Court satisfies itself with indications of possible obstacles to trade that are indirect or based on simple deductions[5]. It could for example be argued that the frequent recourse to safeguard measures in conditions which are not always precisely circumscribed in practice may lead to divergent administrative or even regulatory situations between the Member States. It concludes that appropriate recitals could be designed to that effect"*.

2.2. Position of the Commission's services

14. The Commission's services consider that the present proposal, which aims at providing to Member States extra-grounds to prohibit GMO cultivation in addition to those already offered by the GMO legal framework has, as direct objective, to ensure the smooth functioning of the internal market and that this is sufficiently evidenced in the proposal as well as in the accompanying documents.

15. Moreover, they strongly disagree with interpretation of the Council Legal Service in point 21 of the opinion that Article 114 TFEU could be used to "disharmonize" an area only if the amendment improves the functioning of the internal market.

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[3] Emphasis added by the Commission's services.

[4] Case C-491/01 *BAT* [2002] ECR I-11453, at paragraph 75 of the judgment.

[5] Case C-491/01 *BAT* [2002] ECR I-11453, paragraphs 64 to 74 of the judgment.

2.2.1. The aim and the content of the proposal do ensure the smooth functioning of the internal market in accordance with the conditions of Article 114 TFUE.

16. Firstly, contrary to what is stated in point 21 of the Council Legal Service's opinion, Article 114(1) TFUE does not refer to a condition for a measure to be adopted on that basis of "improving" the functioning of the internal market but only to the "establishment and functioning of the internal market".

17. Given that the current legal framework consisting of Directive 2001/18/EC and Regulation (EC) No 1829/2003 is a comprehensive one, as indicated in recitals 1 and 4 of the proposal, it follows that Member States may restrict the use or sale of certain GMOs on their territory only in cases and under conditions foreseen in the GMO legislation (safeguard clauses/emergency measures) as well as under Articles 114(4) and 114(5) TFUE. The Commission's services note that this analysis is shared by the Council's Legal Service (see points 11, 26, 27 and footnote 6 of its Opinion).

18. Thus the aim of the proposal is to grant powers to Member States to restrict or prohibit the cultivation of GMOs on their territory or part of it for reasons other than those based on the assessment of risks to health and the environment, which is currently not possible under the existing legal framework. Given that the Member States already have the possibility to invoke the safeguard clauses/emergency measures in cases where serious concerns are raised as regards the safety of an authorised GMO, the proposal "adds" extra reasons for Member States creating a common legal basis for all the 27 Member States to restrict or prohibit GMO cultivation.

19. As recognised by the Council Legal Service in point 18 of its opinion, the essential aim of the proposal is to give the Member States, in line with the principle of subsidiarity, some flexibility regarding the cultivation of authorised GMOs, "*in order to facilitate the continued operation of the current assessment procedures which form the basis of the authorisation of GMOs at EU level and to limit the risk of political disputes caused by the use of safeguards in the course of their implementation*". This is clearly indicated in the explanatory memorandum attached to the proposal as well as in the Communication[6]. Both highlight the existing difficulties of the decision making process in the GMO field and the explanatory memorandum clearly enumerates in point 2.1(B) the positive effects that are expected from the proposal. The proposal should facilitate the decision making process, reduce the recourse to safeguard clauses adopted to address concerns not related to health and/or environment or to Article 114(5) TFUE while providing more legal certainty to Member States that wish to restrict or prohibit GMO cultivation, provide greater clarity to affected stakeholders (e.g. biotechnology

[6] Point I "introduction" of the Communication points out the existing prohibitions of the GMO cultivation in six Member States and the rejection by the Council, on four occasions, of proposals of the Commission having the objective to ask Member States to lift its measures. Point 3 of the same Communication also refers to the safeguard measures adopted by some Member States and recalls that EFSA has considered on different occasions that national bans adopted by Member States were not scientifically justified. It also underlines the fact that several regions of the EU have declared themselves GM free.

companies, GMO farmers, organic farmers, conventional farmers, seed producers/exporters/importers, livestock breeders, feed processors and consumers) concerning cultivation of GMOs in the EU and should increase the predictability of the decision-making process.

20. The justifications provided in the explanatory memorandum as well as in the Communication show therefore clearly that the proposal is designed to tackle the issue of safeguard clauses adopted to address concerns not related to health and/or environment protection and thus ensures the smooth functioning of the internal market which, as a matter of facts, cannot be regarded as being currently satisfactory in the GMO field.

21. In addition, the Commission's services would like to point out that given that the proposal consists of just a single operational article to be inserted into a complex legislative framework, the legal basis should be determined by reference to the Directive in the form that would result from the amendment. In this regard, it should be observed that the free movement clauses of the type contained in Article 22 of Directive 2001/18/EC as well as the harmonised conditions of GMO authorisations remain unaffected by the present proposal. In this context it is undisputable that the resulting legislative act does ensure the smooth functioning of the internal market.

22. It should also be noted that where the directive in the first place had already foreseen the possibility to leave the freedom to Member States to prohibit or restrict cultivation on their territory, and given that it appears clearly form the Directive as a whole that the aim and the object of the act is to ensure the smooth functioning of the internal market, the recourse to Article 114 TFUE could not have been questioned.

23. Finally the Commission's services observe that, in point 24 of its opinion, the Council's Legal Service does not seem to contest the choice of Article 114 TFUE as the legal basis of the proposal but rather only the lack of proper justification related to the functioning of the internal market[7]. It recalls that the Court of Justice of the European Union (CJEU) satisfies itself with indications of possible obstacles to trade that are indirect or based on simple deductions[8] and states that "*it could for example be argued that the frequent recourse to safeguard measures in conditions which are not always precisely circumscribed in practice may lead to divergent administrative or even regulatory situations between the Member States*". The Council Legal Service concludes in point 25 of its opinion that the analysis is done *"taking the proposal in its current formulation"*, thus not excluding that were a different formulation to be found, the proposal could be validly based on Article 114 TFUE.

24. The Commission's services consider in this respect that there is no need for further motivation[9] because as also recognised by the Council Legal Service in

[7] In this point of its Opinion, it no longer refers to the "improvement" of the internal market but only to the "functioning".

[8] See for example Case C-491/01 *BAT* [2002] ECR I-11453, paragraphs 64 to 74 of the opinion.

[9] T-211/05 Italy vs Commission [2009] ECR-II-02777.

point 16 of its opinion, the explanatory memorandum and the recitals of the proposal refer to the fact that cultivation is an issue which is more thoroughly addressed by Member States and that Member States have invoked safeguard clauses adopted to address concerns not related to health and/or environment , and that an amendment of the EU legislative framework would be necessary to facilitate the decision making process and reduce the recourse of Member States to safeguard measures The context of the proposal shows therefore clearly that the proposal is designed to have a positive effect on the internal market. However, if the addition of further recitals could allow the Council to accept the choice of Article 114 as the legal basis of the proposal, the Commission's services will consider a revised formulation.

25. Finally, even were it argued that the proposal at stake would not meet the conditions of Article 114 TFUE, *quod non*, it stems from the case law (above mentioned case C-491/01[10]) that, "*even where a provision of Community law guarantees the removal of all obstacles to trade in the area it harmonises, that fact cannot make it impossible for the Community legislature to adapt that provision in step with other considerations*".

2.2.2. Use of Article 114 TFUE for the EU to cease to exercise its competences – parallelism of forms

26. The Council's Legal Service developed at points 20 and 21 of its opinion that, in essence, giving competence back to Member States can only be done on the basis of Article 114 if the amendment improves[11] the functioning of the internal market.

27. The Commission's services consider that this interpretation does not find any base in the Treaties and that it could not only have unworkable results but also significant inter-institutional consequences which go beyond the present file.

28. First it has to be recalled that Article 2(2) TFUE provides that:

"Where the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence".

29. This provision does not set out conditions for the EU to cease exercising its competences in specific areas where competence is shared[12] nor does it provide a legal basis for the EU to act. It stems therefore that where the EU legislator decides to cease to exercise its competence, it should have recourse to the legal basis used in the first place for harmonization.

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[10] See points 77-78 of the judgement.

[11] Emphasis added by the Commission's services

[12] Article 4 TFUE on shared competences refers in paragraph 2 letter a) to "internal market".

30. It would be a contradiction *in terminis* to always assume that the conditions set out in Article 114 for the purpose of approximation of laws at EU level have to be met when the purpose of the amendment is precisely that the EU ceases to exercise its competences and, in some cases, *"give back competence to MS"* in a given sector.

31. If the interpretation of the Council's Legal Service were to be followed, it could have incoherent consequences not only for Article 114 TFUE but also for other Articles. For instance Article 91 provides the EU the competence to adopt measures for the purpose of implementing Article 90 whose objective is the establishment of a common transport policy. If applied to the transport area, the reasoning of the Council's Legal Service would lead to incoherent result, as it would imply that the EU could cease to exercise its competences in this area only if it proves that this is to achieve the objective of establishing a common transport policy.

32. Moreover, even if the Council's Legal Service fails to indicate which legal basis could be used where the conditions set out in Article 114 TFUE are not met**,** it should be observed that the inevitable consequence of that premise is that, in absence of the specific powers provided by the Treaty, the EU legislator should have recourse to Article 352 TFUE for amending EU measures based on Article 114 TFUE in order to "disharmonize" a given field[13].

33. Article 352 TFUE provides that the Council acts unanimously on a proposal from the Commission after consent of the European Parliament. That interpretation would have the consequence to make much more complicated the process of giving back competences to Member States (unanimity required) at the Council level and at the same time would deprive systematically the European Parliament of its right as a co-legislator to decide to whether the Union should cease to exercise its competence in a given area creating an imbalance between the two co-legislators.

34. Further, since it is an obligation for the institutions to ensure "constant respect" of principles of subsidiarity and proportionality in accordance with Article 1 of Protocol No 2 on the application of the principles of subsidiarity and proportionality, also recognised by the Council's Legal Service in point 20 of its note, the systematic recourse to Article 352 TFUE would impede the attainment of such an objective as the decision making process would be significantly heavier.

35. Following the same line, having systematic recourse to Article 352 TFUE for cases where the intention is a simplification of the legislation or a removal from the Union legal order of obsolete directives appears to be totally disproportionate and incoherent. The Commission's services note in this respect that the COREPER did not opposed to a Council and Parliament directive repealing Council Directives 71/317/EEC, 71/347/EEC, 71/349/EEC, 74/148/EEC, 75/33/EEC, 76/765/EEC, 76/766/EEC, and 86/217/EEC recently

[13] This term is used by the Council Legal Service in point 21 of its opinion.

submitted to Council regarding metrology [COM (2008)801] despite the fact that the legal basis of the proposal is Article 95 (now Article 114 TFUE) and that the aim of the proposal focussed on the obsolete character of these Directives, and not on the functioning of the internal market.

3. POSSIBLE NATIONAL MEASURES: UNION LAW

3.1. Council's Legal Service's opinion

36. The Council's Legal Service in its opinion at point 28 notes that *" the proposal does not seek to give Member States "carte blanche" with regard to cultivation restrictions of GMOs that have been authorised at EU level"* even though no list of grounds/justifications has been detailed in the proposal.

37. In point 29, the opinion indicates that problems that might arise as a result of coexistence of GM and non-GM crops are already dealt with in Article 26a of Directive 2001/18/EC. It concludes - without any kind of explanation - that "the preservation of cultural and social tradition appears to be taken care in this context".

38. It also states in the same point of its opinion that other motives of economic nature could hardly be relied as following constant case-law on free movement of goods cannot be restrained by aims of "*purely economic nature*". It therefore concludes that the *"obvious remaining candidate as a ground for restriction would be ethical concerns since these are referred in the legislation"*. It argues, however, in point 33 of its opinion that national measures which could be based on ethical considerations appear to be difficult to defend before the CJEU because it would be "*difficult to convince the Court that ethical concerns genuinely lay at the root of a cultivation ban of GM seed, if at the same time meat derived from animals that had been fed on GM feed were permitted*". *"Moreover, it is apparent from the judgment in the Commission v Poland C-165/08*[14] *case that the Court regarded the claim that the marketing ban there in issue really was motivated by ethical concerns with considerable scepticism. Clearly, substantive, persuasive and unequivocal evidence would be required"*.

39. The Council's Legal Service accepts however in point 35 of its opinion that "*in the case of a regional prohibition based on ethical grounds, a different conclusion could <u>theoretically</u> be reached if, in a given case, the part of the national territory concerned was so small, relative to the territory of that Member State as a whole, that there would be no real denial of market access"*.

3.2. Position of Commission' services

40. The Commission's services first note that no list of grounds has been provided in the proposal in order to avoid limiting Member States' freedom of choice.

41. The Commission's services do not exclude that apart from ethics other grounds could be invoked such as "public order" (for instance to avoid social unrest due

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[14] C-165/08 [2009] ECR I-6843.

to the destructions of GMOs affecting the public order of the country), or other reasons relating to the public interest aiming at preserving cultural and social tradition or at ensuring feasibility of controls or balanced rural conditions. As announced by Commissioner Dalli, the Commission's services are ready to work with the co-legislator to identify an open list of possible justifications that could be used by Member States to support a measure restricting or prohibiting GMO cultivation.

42. The Commission's services agree with the Council's Legal Service that any national measure should be carefully designed to withstand the Court scrutiny and not be contradictory, and that substantive, persuasive and unequivocal evidence would be required.

43. However, they do not share the scepticism of the Council's Legal service that in practice such a measure could not be adopted.

44. Based on an *"a contrario*" reading of case Commission vs Poland C-165/08 referred to in point 30 of the Council Legal Service's opinion, where a Member State proves that a given measure is genuinely based on ethical considerations and carefully designed, it could in practice stand the scrutiny of the Court. In that case, as the Court held in point 57 and 59 of its judgement, the reasons why it could not accept that Member State's defence was the mixed nature of the justifications invoked by that Member State and the lack of substantiation that such ethical considerations were indeed at the origin of the national measures. The Court held in point 59 of its judgement that, *"the adoption of the contested national provisions was in fact inspired by the ethical and religious considerations described in the defence and the rejoinder, whereas in the pre-litigation procedure, Poland based its defence mainly on the shortcomings allegedly affecting Directive 2001/18, regard being had to the precautionary principle and to the risks posed by that directive to both the environment and human health".* The Commission's services notes in this respect that, as indicated by the Council's Legal Service in point 31 of its opinion, the Court has recognised that Member States enjoy a degree of discretion when defining its own conception of public morals[15].

45. With regard to the alleged incoherence/contradiction of a Member State's measure restricting or prohibiting cultivation of GMOs on its territory for ethical reasons but accepting meat from animals fed with GMO (see point 33 of the Council Legal Service's opinion), the Commission's services first note that products obtained from animals fed with genetically modified organisms do not fall under the scope of the GMO legislation as indicated in recital 16 of Regulation (EC) No 1829/2003. Thus it could not be argued that there is incoherence or contradiction of any national measure precisely because the latter products are not even covered by harmonized rules.

46. The fact that the national measure would refer to ethics as a justification to prohibit cultivation of GMOs while at the same time it would not prevent the free circulation and use of food or feed produced from a GMO (this category

[15] C- 34/79 R.v. Henn and Darby [1979] ECR 3795.

being covered by the harmonised legislative framework) cannot be considered as incoherent/contradictory because a Member State can only adopt measures in a field which is fully harmonised if the EU legislation empowers it to adopt them. Where the EU legislation only grants such power to limit or restrict cultivation, the Member State can not adopt any other measure which would restrict the marketing or use of GMOs whatever the reason is. Thus it can not be argued that the national measure adopted is incoherent/contradictory because under EU legislation no other national measures affecting the marketing of GMOs for reasons other than science could be validly adopted by a Member State.

47. Finally, the Council's Legal Service states in essence in point 35 of its opinion that only a regional prohibition based on ethics that would be so small relative to the territory of that Member State as a whole that there would be no real denial of market access could in theory be accepted by the CJEU. The Commission's services would like to observe that the reference to ethics in this context is irrelevant. Indeed where a prohibition of use of a product cannot be considered as equivalent to an obstacle to free circulation of goods as defined by Article 34 TFUE, the Member State concerned does not need to refer to the exceptions of public order recognised by Article 36 TFUE and related case-law of the CJEU. As a matter of fact coexistence measures currently adopted by Member States on the basis of Article 26a imposing distances between fields where GMOs are cultivated and other fields (and thus restricting the zones of cultivation of GMOs) are considered compliant with the Treaties not because they are based on ethics but only because they are not considered as an hindrance to free circulation of seeds (provided that they are proportionate).

4. POSSIBLE NATIONAL MEASURES: GATT

4.1. Council Legal Service's opinion

48. The Council Legal Service is of the opinion that the SPS and TBT Agreements are unlikely to be an issue for national measures adopted on the basis of the new Article 26b, which would be added in the Directive by the proposal.

49. However, it points out possible difficulties as regards the GATT agreement, in particular in light of its Article III.4 and Article XXIII(b). It considers that in circumstances such as those contemplated by the proposal, it cannot be excluded that measures adopted by Member States on the basis of the proposal would be covered under one of these Articles, requiring thus the need to examine possible reliance on Article XX(a) which provides a general exception clause for measures necessary to protect "*public moral*".

50. In this respect it considers that "*the same concerns arise in the GATT context as in the internal EU context. It would therefore be incumbent upon the Member State concerned, whose defence before a Panel would be assured by the Commission, to supply sufficiently persuasive evidence that a cultivation ban was genuinely "necessary" to protect public morals. As already explained, in such a case there would be inherent difficulties in demonstrating a morally*

consistent line on GM products, particularly where they are permitted in different forms such as animal feed".

4.2. Position of the Commission's services

51. Firstly, the Commission's services observe that the Council's Legal Service opinion did not raise any concerns as regards the compatibility of the proposal itself with WTO rules but only with regards to future measures that would be adopted by the Member States on the basis of the proposal. At the Council Working Party of 11th of November 2010 it indeed reconfirmed orally that the proposal as such is compatible with WTO law.

52. Secondly, as a general consideration, and as underlined in the explanatory memorandum of the proposal, the Commission's services note that the proposal rather seem to improve the existing situation as regards GMO cultivation in the EU. In this regard, with respect to WTO law, it should be recalled that in 2006, the EU was found in violation of the SPS agreement. One of the Member States measures which was found in violation remains in place and similar measures have been adopted by other Member States - several of which having been found by EFSA to be scientifically unjustified. While some of these measures focus on GMO cultivation, other are directed against the marketing of seed. The Commission has failed to date to obtain the support of the Council to have those measures lifted. Even if the Commission has managed to reach settlement agreements with two out three WTO complainants, the USA still retains its right to resume litigation.

53. In this context, it should be observed that the circumstances that the proposal prohibits the Member States to ban import and free circulation of seeds as well as to ban cultivation of seeds in which an adventitious presence of GMOs is found[16] reduces the potential for adverse effects on trade by comparison to what prevails under existing situation.

54. Thirdly, on the substance of the analysis carried out by the Council's Legal Service, the Commission's services also agree that the SPS agreement as well as the TBT agreement are unlikely to be an issue for national measures adopted on the basis of Article 26b of the proposal because precisely such measures are not based on scientific and environmental grounds, and that any analysis of the national measures should be carried out with regard to the GATT agreement.

55. With regard to the analysis carried out by the Council's Legal Service of the margin of manoeuvre of Member States to adopt measures restricting or banning the cultivation of GMOs, which suggests that the new legislation is not worth having from the point of view of WTO law, the Council Legal service seems to already anticipate the difficulty of defending any national measure based adopted under Article 26b. However, the Commission's services consider that it really all depends on what kind of measure would be adopted and on all the surrounding facts (the justifications put forward by the Member State concerned and its particular circumstances).

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[16] See recital 7 of the draft Regulation.

56. The Council's Legal Service focuses its analysis in point 38 therefore on **Article III.4** of GATT which requires in essence that contracting parties to accord treatment *"no less favourable than that accorded to like product of national origin"*. It rightly points out that the critical issue in relation to that matter is whether GM and non-GM products are "like". It draws the attention to the fact that if a Member State intended to claim that GM and non-GM products are not like, then detailed evidence to that effect would have to be supplied. Assuming a worst case scenario in which the two products are like it then concludes in point 40 that a prohibition on the use of a product is likely to amount to a less favourable treatment and would therefore constitute a breach of Article III.4 of GATT.

57. The Commission's services observe, however, that as recognised by the Council's Legal service in point 39 of its opinion, detailed evidence which would demonstrate that GM and non GMOs products are not "like" should be provided by a Member State but it does not exclude that this evidence can be provided.

58. The Commission' services note in any event that the fact that the GMO legislative framework establishes specific rules applicable to GM products rather underlines that these products are not "like" equivalent non GM products. The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is inspired from the same logic.

59. It in fact bases its analysis on a "worst case scenario' as it names in point 40 of its opinion, that GMOs and non GMOs products are found to be "like".

60. In this respect the Commission's services would like to point out that, as implicitly recognised by the Council Legal Service when referring to "worst case scenario", even where products could be considered "like" a breach of Article III:4 is far from certain. National measures would *de jure* treat domestic and imported products in an identical fashion and a great deal would depend on the precise terms of any measure and all the attendant facts. A WTO adjudicator would likely carefully scrutinise the aim and effect of the measure, and any other relevant facts suggesting a breach.

61. Finally , even if the Council's Legal Service states in point 41 of its opinion that a breach of **Article XI** could be thought of, it then recognizes that the type of measures contemplated by the proposal would not restrict the placing on the market as such but merely the cultivation. It refers though to **Article XXIII b)** of the GATT which deals with nullification or impairment benefit but it does not develop any analysis in that respect simply suggesting that it can not be excluded that a national measure would be covered by that provision.

62. As regards the need to examine possible reliance on Article **XX(a)** of the GATT (see point 42 of the Council's Legal service opinion) which provides a general exception clause for *"measures necessary to protect public moral",* it is important to stress that a measure has to be envisaged in light of the exceptions enumerated in Article XX of the GATT agreement only if it is considered as infringing one of the provisions of the GATT agreement which, as stated above, is far from certain. Indeed if the complainant would fail to demonstrate

incompliance with GATT obligations, the EU would not have to place itself on the grounds of one of the Article XX exceptions.

63. Finally the Commission's services notes that WTO jurisprudence[17] on these issues, notably as regards Article XX(a) is rather limited. It is thus very difficult to predict the outcome if a WTO challenge was made against a Member State measure which was taken pursuant to the proposal.

64. In conclusion the Commission's services considers that GATT compatibility will depend on what kind of measure would be adopted and all the surrounding facts. As explained in the Working Party by the Commission's representative, the Commission would, as required by the Treaties, defend any measures adopted by Member States in the GMO area.

5. OVERALL CONCLUSION:

65. For the reasons above mentioned the Commission's services considers that its proposal is validly based on Article 114 TFUE and is compatible with WTO law and that it can not be concluded in abstracto and in a prioristic 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.

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[17] Apellate Body Report, United States – Measures affecting the Croos-Border Supply of Gambling and Betting Services, WT/DS285/AB/R adopted 20 April 2005.