

Compelling Grounds” for Restrictions and Bans on GM Crops Cultivation: National, Regional, Local

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Transposition of Cultivation Directive in Germany

Will Germany transpose the Cultivation Directive?

- ❖ **Second House of Parliament** called for transposition (decision 11 April 2014).
- ❖ **Federal Parliament** called for a legislative proposal for transposition (decision 20 May 2014).
- ❖ **Federal Ministry of Food and Agriculture (MFA)** has presented a draft law on 20 February 2015 with the objective to allow for individual restrictions and bans on GM crop cultivation.

Conclusion:

There will **most likely be a transposition in Germany** but some details regarding (1) transposition and (2) bans / restrictions are still rather contentious.

To be distinguished: (1) transposition and (2) enactment of individual restrictions and bans!

The big challenges for a complete ban of cultivation of a given GM crop in Germany

1. From a legal perspective (details below)

- ❖ Certain politicians and stakeholders are demanding to **completely ban the use of a product** (i.e. GM seeds) which is
 - **safe** (and therefore duly authorized) and
 - **freely movable across the common market** (also after ban is enacted).

There is no example in the history of the Federal Republic of Germany where such kind of a ban has ever been enacted for a product!

Compare **tobacco/alcohol**: we know it is not safe + entails high socioeconomic costs, but we only restrict the use!

The big challenges for a complete ban of cultivation of a given GM crop in Germany (continued)

2. Communication problems

- ❖ Draft law of MFA creates in accordance with directive the possibility to ban or restrict the cultivation of a given GMO for **other reasons than risks to health & environment.**
- ❖ But many people are not believing this. They believe that the government is banning or should ban cultivation, because GM crops are **not safe**. This “not safe-argument” is constantly reiterated by certain stakeholders/NGOs.
- ❖ **New plant breeding techniques (NPBT)**
 - Herbicide tolerant plant modified by GE: **ban is possible.**
 - Herbicide tolerant plant modified by NPBT (e.g. mutagenesis): **ban is not possible.**

How do you explain convincingly this difference to consumers?

Transposition of Cultivation Directive in Germany

Main content of the draft law of the Federal Ministry of Food & Agriculture of 20 February 2015 transposing the cultivation directive.

The draft law follows the principle that

- ❖ the federal law sets the necessary legal framework by transposing the substantive and procedural provisions of the Directive essentially 1:1,
- ❖ the federal states are responsible for the measures under phase 1 and phase 2,

because

- ❖ the focus of the “compelling grounds” is regional and local,
- ❖ the approach suits the federal structure of Germany best.

Phase 1 - according to draft law:

- ❖ The **federal states are responsible** for the demands to exclude all or part of their territory from cultivation (federal government solely “letter box” for communication with COM).
- ❖ **Main questions still under discussion:**
 - Must the demand be accompanied by a **written justification**? Probably a demand without giving grounds would be illegal, because the demand forces the notifier/applicant to act if he does not agree with the demand (rule-of-law principle; fundamental rights affected).
 - Does the notifier/applicant have the right to **adjust or confirm** in his response the geographical scope of its initial notification/application only **partially**, i.e. for region X but not for region Y?
 - Should the federal government be responsible for the demands?

Phase 2 - according to draft law:

- ❖ Federal states may ban or restrict cultivation of a given GMO in accordance with Art. 26b Paras. 3 and 8 Cultivation Directive, **but**:
- No restrictions or bans for **research** with authorized GMOs (fundamental right “**freedom of research**”; request by Federal Parliament to stop exodus of research).
- [relevance for] town & country planning.
- [avoidance of predominantly negative] socioeconomic impacts.
- **List** of “compelling grounds” is **not open but closed** (constitutional law requirement: “general public interest”).
- ❖ **Federal states may delegate power** to restrict or ban to **regional/local authorities.**

Phase 2 - according to draft law (continued):

Examples of issues still under discussion:

- ❖ **Who is in charge of enacting restrictions and bans**, federal government or authorities of the federal states, or perhaps both?
- ❖ **Obligation to ban** when “compelling grounds” justify it?
- ❖ **Fall back to (some parts of) Council’s common position** of 23 July 2014 (e.g. link between phase 1 and 2, no bans for groups of GMO, bans and restrictions only within 2 years after authorisation)?
- ❖ Extend of the **exemption for research**?
- ❖ (Political) link with future decisions of Germany in SCPAFF and the appeal committee (**science based in the future**)?

Phase 2 – Prerequisites for restrictions and bans:

The prerequisites of Art. 26b Paras. 3 and 8 mean:

Restrictions and bans on cultivation of GM crops must be in accordance with:

- ❖ **free circulation** of e.g. authorised GM seeds and harvested GM commodities,
- ❖ the **fundamental EU** rights such as freedom to choose an **occupation** and conduct a **business**, right to **property** and **freedom of science**,
- ❖ **WTO-rules** (Art. 216 Para. 2 TFEU).

Therefore the **principle of proportionality** assumes a crucial significance. This is also expressed by the fact that the Cultivation Directive always speaks of “**restrictions** and **prohibitions**” on **cultivation!**

Phase 2 – Prerequisites for restrictions and bans (continued):

- ❖ **Environmental and agricultural policy objectives**, serving as a “compelling ground”, are not permitted to be identical with the means of pursuing these objectives; otherwise there would be a possibility to completely undermine fundamental rights.

Example for **impermissible objective**:

- Agricultural policy objective: no cultivation of bt maize xyz.
 - Measure: ban on cultivation of bt maize xyz.
- ❖ **The coherence imperative**: in each instance it must be stated why attainment of the respective “compelling ground” necessitates the prohibition of a given GM crop cultivation but not conventional crop cultivation.

Example: why does the maintenance of local biodiversity (recital 14) require a ban on bt maize xyz and not on conventional maize and perhaps on maize produced with NPBT?

Phase 2 – Prerequisites for restrictions and bans (continued):

“Burden of proof” for existence of “compelling grounds”

- ❖ “In that regard, the reasons which may be invoked by a Member State by way of justification must be accompanied by appropriate evidence or by an analysis of the appropriateness and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated” (ECJ, 07.06.2007, case C-254/05 (*COM ./ Belgium*) [2007] ECR I-04269 para. 36 “case on fire alarm system”).

Phase 2 – Prerequisites for restrictions and bans (continued):

“Burden of proof” for existence of “compelling grounds” (continued):

- ❖ “Whilst it is true that it is for a Member State which invokes an imperative requirement as justification for the hindrance to free movement of goods to demonstrate that its rules are appropriate and necessary to attain the legitimate objective being pursued, that burden of proof cannot be so extensive as to require the Member State to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions”(ECJ, 10.02.2009, case C-110/05 (*COM ./ Italy*) [2009] ECR I-00519 para. 66 “case on motorcycle-trailers”).

Phase 2 – Prerequisites for restrictions and bans (continued):

**“Burden of proof” for existence of “compelling grounds”
(continued):**

Conclusion:

- ❖ MS must prove in a “plausible manner” that “compelling grounds” exist and the principle of proportionality is respected.
- ❖ Proof must be backed up by (scientific) data.
- ❖ Requirements for “burden of proof” could be higher, because “compelling grounds” do not concern risks to health or environment (precautionary principle does not apply).

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals

a) Environmental policy objectives / b) town and country planning:

- maintenance and development of **agricultural practices** which offer a better potential to reconcile production with ecosystem sustainability,
- maintenance of **local biodiversity**, including certain habitats and ecosystems,
- maintenance of **certain types of natural and landscape features**,
- maintenance of **specific ecosystem functions and services**.

c) (and so forth)

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (continued)

d) socioeconomic impacts (as one example)

- high cost, impracticability or impossibility of implementing **coexistence measures specifically for maize** due to specific geographical conditions, such as small islands or mountain zones,
- **need to avoid GMO presence of bt maize residues in other products** such as specific or particular products,
- **Commission report** to EP and Council on socioeconomic implications of GMO cultivation (Dec. 2008).

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Example of possible approach for specific restrictions and bans

Approach A:

- Measures restricting or banning bt maize cultivation in order to **prevent negative effects on a GM-free overall production system** (avoidance-costs, e.g. for analysis and separation of products, should not be borne by those wishing to produce without GM technology).

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Preliminary assessment of approach A:

- **Policy objective “GM free production system”** must not be identical with the measures pursuing these objectives.
- A GM-free overall production system does not exist in Germany (*inter alia*, around 6.5 m. t/a of GM soya imports)
- Due to the GM imports of maize and maize seeds, analysis costs are incurred anyway.
- Damage caused by non-authorised GMOs does not constitute “compelling ground”.
- Essentially, non-GM labelling is currently limited to foods of animal origin. 0.9 % threshold applies to the feed.

Conclusion: very difficult to justify.

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Example of possible approach for specific restrictions and bans

Approach B:

- Restriction or ban on bt maize in regions / local areas with a high incidence of **conventional and/or organic maize production.**

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Preliminary assessment of approach B:

- Among small enterprises, separation costs and analysis costs have a particular disproportionately-large impact; e.g. shared use of machines becomes more problematic.
- Therefore a ban in regions / local areas characterised by smallholding-based farming can be justified.
- But be aware of **principle of proportionality**: Would not restrictions be sufficient in the concerned region / area?

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Example of possible approach for specific restrictions and bans

Approach C:

- Restriction or ban on bt maize in regions / local areas with GM-free honey production.

The “compelling grounds” for restrictions and bans on bt maize xyz taken from the recitals (**socioeconomic impacts as one example, continued**)

Preliminary assessment of approach C:

- Even in the case of foods labelled GM-free, including honey, a contamination up to 0.1% caused by authorised GMOs is accepted by inspecting authorities.
- In the case of honey, analytical results on GM pollen are always very significantly below the 0.1 % value, this is especially true for maize (maize is not attractive to bees).
- The European Coexistence Bureau's assessment is that rules of co-existence are unnecessary for the cultivation of GM maize and the production of conventional and organic honey.

Conclusion: restrictions and bans most likely not justified.

Geographic accumulation of “compelling grounds” for bt maize xyz (compare examples mentioned in recitals)

area with high density of organic maize plantings

area with many small farms planting conventional maize (small scale agriculture)

area where harvested maize is in fact used for GM-free labelling

seed propagating area for conventional maize

facility for conventional maize seeds processing

GM-free honey production ???

area where ban/restriction on bt maize xyz (but not on conventional maize) is necessary to protect local biodiversity or “reconcile maize production with ecosystem sustainability”

“White spots” may remain.

Mountain zone

small island

Some Conclusions:

- ❖ The focus of the “compelling grounds” is clearly **regional and local**.
- ❖ The more accurately restrictions or bans take account of the **regional and local circumstances**, the more likely the principle of proportionality is respected.
- ❖ **Bans are much harder to justify** than restrictions.
- ❖ It is easier to find “compelling grounds” for a ban in a **small MS** than in a **MS with a large territory**.
- ❖ To claim that “compelling grounds” are present is not sufficient. The MS must present (scientific) data and demonstrate in a “**plausible manner**” that the compelling grounds exist and that the **principle of proportionality** is respected.
- ❖ **Accumulation of “compelling grounds” is crucial**, if a ban should apply to a large territory.

Transposing the cultivation directive is not a “free lunch”

- Research on agricultural biotechnology is leaving Germany.
E.g. experimental releases in Germany with GM plants:
In 2000: approx. 227. Since 2013: zero.
- Germany is losing know how, the competence to assess the risks and benefits/chances of agricultural GE and becomes less attractive for certain investors.
- What is the impact on other new technologies (e.g. nanotechnology, synthetic biology)?
- What if “opt out-approach” is taken by third countries importing European / German products (ban on use for “socioeconomic reasons” for “western products”)?
- ❖ Do possible (short-/medium-term) gains outweigh this loss?