DRAFT OUTLINE - CHECK AGAINST DELIVERY

Directive 2015/412 - judicial review of restrictions of cultivation of GMOs based on socioeconomic grounds

Introduction

Directive 2015/412 introduced the possibility, for the first time, for MS to restrict the cultivation of GMOs socioeconomic grounds. Regardless of doubts as to the precise extent or meaning of the concept of "socioeconomic" in this context, it is clear that the Directive represents a major innovation. However, it is also clear that the Directive has not given MS a "blank cheque", and that justifications will have to be supplied, because we know that in the Union's legal order there is always a right of redress. The party that is not content with the decision taken may challenge that decision. So, the subtitle of this presentation could be *"how do you make your decision stick?"* How do you ensure, in other words, that a decision taken is not subsequently annulled by a court?

I will begin by dealing briefly with the procedural framework (**I**), because this is really what you have to focus on at the outset at national level. I will then turn to how the European Court of Justice ("ECJ") is likely to review the substance **(II)** of any decision taken at national level regarding socioeconomic considerations.

I - procedural framework

The mechanism for judicial review of national acts, taken in the context of Union law, needs to be understood because if you don't get things right at this stage then it's often difficult to correct later. The procedural framework is actually very straightforward, because it is so well established. A likely scenario would be as follows. A minister, or other national authority, would decide that a part of the territory should be excluded from the cultivation of GMOs because of the socioeconomic impacts that such cultivation would have. A farmer, and/or a biotech company, would then challenge that decision before a national court or tribunal, claiming that the decision was not in accordance with the conditions laid down by the Directive.

This would mean that the biotech company would be arguing, e.g., that the decision was disproportionate or otherwise not in accordance with Union law. I'll come back to what that means in the next section. The important thing at this "first instance" stage however, is to remember that this is your best opportunity, as national officials advising the minister or other national authority, to get your evidence and arguments in order. If you do not, then the credibility of your position before the ECJ will be seriously undermined.

The sort of discussion we're having may seem somewhat abstract, but I cannot stress too greatly the importance of evidence. If you're claiming a socio-economic justification, such as distortion of the market, do so with supporting evidence - the more detailed and more extensive the better. Ideally, you will then have findings of fact made by the national judge on which to rely, rather than just your own assertions.

In the scenario I've outlined, one would expect the biotech company to ask for a reference for a preliminary ruling, in accordance with Article 267 TFEU. This is the means by which a national court may ask the ECJ for a ruling on the meaning, or validity, of Union law. If it is

a court from which there is no appeal, e.g. the supreme court of a Member State, then a reference must be made. Once could imagine therefore a question along the lines of *"in the circumstances of the present case, is a national authority entitled to conclude that the conditions for recourse to Article 26b(3)(d) of Directive 2001/18 are satisfied?"*

The reason why this stage is so crucial is because it has a significant effect on the way the ECJ will approach the question, which begins (not only in this scenario, but very often) with the words *"in the circumstances of the present case."* As the preliminary ruling procedure is based on cooperation between national courts and the ECJ, the ECJ will often be reluctant to question the findings of fact made by the national court.

II - substance: judicial review by the ECJ

Unlike the procedural framework, this section is much more complicated. What we're engaged in here is assessing how the ECJ would be likely to deal with:

- a new provision of Union law,
- where there is no directly relevant case law regarding the term "socioeconomic",
- in circumstances where a national authority is seeking to adopt a measure that is restrictive of the internal market, and
- the national measure is adopted pursuant to a Directive that was adopted on the internal market legal basis in the TFEU (Art. 114).

That certainly seems like an enormous challenge. However, we have had decades of case law from the ECJ regarding restrictive measures adopted by Member States. The fact that those cases have dealt with other policy fields does not prevent us from deducing some general principles that are relevant for present purposes. The present exercise therefore involves drawing inspiration from other cases which concerned the restriction of fundamental freedoms, and examining how the ECJ dealt with the justifications advanced by the MS.

As specialists, it is important for us never to forget that the ECJ is a single supreme court. It doesn't have a specialised chamber dealing with environmental or agricultural matters, e.g. It is extremely conscious of the impact of its judgments in other fields, and of its role as a single unifying force in the Union legal order, of which **it** is the head. We can talk of "DG Sanco" of the Commission, or the "Envi Council" (even though, legally speaking, there is only one Commission and one Council), but the ECJ is different.

The reason why this matters is that something which might make perfect sense to specialists in the field of GMOs with regard to restrictions on socioeconomic grounds, will almost certainly not seem so obvious to the ECJ, which will be mindful of the effect of its pronouncements on other completely unrelated fields. Already, then, you're facing a difficult task. How to deal with this?

Well, of course you will have your evidence and, hopefully, your favourable findings of fact from the national court. The task then is to fit all this material into the ECJ's "mindset" of market-driven integration, subject to only limited derogations. This is where cooperation between the experts at national level and those responsible for representing a MS before the ECJ is of the utmost importance. Certain "red lines" have emerged clearly from the ECJ's case law, but I want to focus on three points that will be of particular importance in defending the validity of national measures based on socioeconomic considerations.

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II.A "Socioeconomic"

"Socioeconomic" is not defined in the Directive, and I won't attempt to perfect the legislation this morning and provide an exhaustive definition of the concept. However, the Court, in seeking to give this new term in the Directive some useful effect, would no doubt draw inspiration from work in other international fora, e.g. the CBD, UNEP, as well as the Commission 2011 report (COM (2011) 214 final) and its accompanying documents.

We do know that the Court has consistently rejected approaches to restricting fundamental Treaty freedoms that have been based on "purely" economic considerations (*C-120/95 Kohll*). However, where the economic considerations have an impact on other aspects, such as the maintenance of adequate healthcare infrastructure or the coherence of the tax system, then the Court has been willing to accept national justifications. We also know that measures to combat what has become known as "social dumping" may also be accepted, in principle (*C-341/05 Laval*), subject to conditions. What you will be looking for, then, in your justifications for restricting cultivation under this ground, is something more than "purely" economic, with a real social impact, and supported by evidence not assertions.

II.B Proportionality

Compliance with the principle of proportionality, which is a general principle of Union law, is one of the "red lines" I mentioned a moment ago. In Union law, if we say that a measure is proportionate, we are basically saying 2 things. First, that it is appropriate to meet a

legitimate policy aim. Second, that it does not go beyond what is necessary to achieve that aim.

Applying that to the context of socioeconomic considerations being used to restrict the cultivation of GMOs, the second limb of the test is probably going to be harder to satisfy than the first. However, if you are seeking to persuade the Court that only the restriction on cultivation in a particular region of your country was based on socioeconomic considerations then you will be in a stronger position. Is the entirety of your agricultural sector *really* composed of small farmers whose domination by a large agro-industrial company and its single pesticide motivated you to act? In applying the principle of proportionality, the Court will be much more inclined to accept justifications, on this one single ground, in relation to a defined region than in relation to the entirety of the territory of a country the size of Hungary.

Here it is also important to remember that the Directive expressly permits the use of grounds in combination with each other. Conceptually, the grounds may be distinct, but in practice there may be a degree of overlap, e.g., between town and country planning and socioeconomic grounds. In terms of making your national decisions as resistant as possible to legal challenge, a combination of the grounds - always supported by evidence of course - is likely to be a much better strategy than putting all your eggs in a single basket.

II.C Non-discrimination

This aspect needs to be mentioned, not just because it is referred to in the Directive, but because of all the Court's "red lines" this one is adhered to particularly strictly. If there is any suggestion that there might be some discrimination, e.g. by treating importing GM products less favourably than domestic GM products, then no matter how strong your evidence with regard to the socioeconomic impacts, the ECJ will come down very hard against your national measures.

I suspect in practice this won't be so much of an issue, because Member States that are traditionally less enthusiastic about GM products tend to be consistent in their approach. The various safeguard measures that have been adopted by Member States were not, after all, intended to protect domestic GM production but reflected genuine national concerns.

Conclusion

Where all of this leaves us can probably be summarised as follows. You have, under Directive 2015/412, genuine opportunities for restricting the cultivation of GMOs on socioeconomic grounds, for the first time. Legal challenge to such national measures may be expected according to well-established procedures. Successful defence of such challenges will depend on well-substantiated national measures, and the role of evidence is crucial. It will also be easier to defend national measures where more than one ground has been used, and where the national measures do not extend to the whole territory.

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The views expressed are those of the author, and in no way represent the official position of the Council.