

## Germany plans illegal law on GMOs

The future German government – a coalition of Social Democrats and Christian Democrats – on November, 10<sup>th</sup> 2005 reached an agreement on a new German Genetic Engineering Law. The draft provisions de facto repeal liability for contamination of GMO-free agriculture and take away any incentive for GMO-farmers to take care of their GMO-free neighbors. But the new provisions contravene both German and European law:

1. Following the law of the WTO and EU-law the German Constitution favors a market economy basically free of state influence. The entrepreneur has the right to take the profit of his activities but also has to burden the risks of it. The corollary of this principle is that a company may not generate profits at the expense of the taxpayer. As regards the environment this tenet even is part of the EC-Treaty as Art. 174 explicitly stipulates the polluter pays principle. If the state via a fund bears the costs of GMO contamination inflicted to conventional or organic farmers, he infringes Art. 174 EC-Treaty. Apart from that it also constitutes an illegal state aid according to Art. 87 EC Treaty because this subsidy distorts the competition between GMO and GMO-free produce.

2. But even a fund completely financed by private companies wouldn't be compatible with long standing tenets of German civil law. According to § 906 German Civil Code a polluter who inflicts damage to his neighbor has to pay compensation even if he complies with good professional practice or other civil obligation. The reason for that is simple: neighbors are bound together in a very special way. They depend in their personal and commercial existence on their plot of land. If there are incompatible uses of the adjacent properties they can't evade this conflict. So the only way to strike a just balance between two neighbors, who both carry out legally admitted activities but nevertheless harm each other is to allow the noxious activity but in turn grant the neighbor compensation claims. This strict liability has been a long standing tenet of German adjacent law right from the beginning until today. If the proposed law would change that in case GMOs are involved the legislator would act arbitrarily and thus breach the principle of equality stipulated in Art. 3 of the German Constitution. This unequal treatment specially designed to promote the GMO industry would be a severe discrimination against all GMO-free farmers.

3. But even if the proposed privilege for GMO farms is not considered as foiling German adjacent law, there is an overwhelming chance, that the concrete design of the new liability rules will run against fundamental guarantees of the German Constitution such as the protection of property of GMO-free farmers (Art. 14) and the obligation of all state powers to protect the environment (Art. 20a). Besides it would also be a breach of European law such as the Convention on Biodiversity which the EU is contracting or the precautionary principle as laid down in Art. 174 EC-Treaty.

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