Summary: "Green Biotechnology and Environmental Protection"

Prof. Dr. Felix Ekardt, Bremen
Dr. Steffi Ober
NABU Headquarters Berlin
2009

Editor: NABU *(Naturschutzbund Deutschland e.V.)*
Editorial Office: *NABU Headquarters, Charitéstraße 3, 10117 Berlin, Germany*
Phone: *+49 (0)30 – 284 984 0,* ***eMail:*** *NABU@NABU.de*

Green biotechnology poses one of the most important problems for the future of nature conservation. Transgenic organisms have both an indirect as well as a direct influence, that much can be said, on biological diversity, which is one of the central protected commodities of nature conservation. Meanwhile, the legal basis for this technology is often unclear and known only to few experts, especially when it comes to the crucial details. This is a lamentable situation as the majority of the public has a clear, mostly skeptical view on genetically modified organisms (GMO's). Therefore, people should be made aware of their rights and how to administer them.

Therefore this study focuses on various fields of conflict between Green Gene Technology and interests of nature conservation. Where deemed appropriate, it also presents problems that exist in neighbouring, yet interlinked fields of law, e.g. food law. The study pursues two goals: It wants to identify and to describe the main fields of conflict for persons affected. At the same time it addresses the expert audience as it reveals some of the unresolved problems that will be at the centre of discourse in the near future. In the wake of this identification process, manifold practical and judicial issues became clear and were dealt with. However, this study has a clear jurisprudential vantage point. It cannot and doesn't want to replace scientific analysis of the impacts of GMO´s.

Our first step was to gather and analyse the latest case-law so that lawyers and environmentalists are provided with a first evaluation of the problems they might face and what ruling they would probably have to expect if they considered taking their case to court. On this basis we tried to present potentially helpful legal arguments as much as suggestions for amendments of the respective European and German law. Here, the fact that environmental law and the law concerning GMO´s are interwoven on many levels had to be kept in mind. Often this state of being interwoven complicates even the mere understanding of the basic proceedings that have to be followed in order, e.g., to release GMO into the environment.

Our second goal was to show how persons who are personally affected by GMO´s and/or NGO´s can take legal action against the deliberate release of GMO´s and against them being placed on the market. One thing has become clear: In the light of international and European law the restrictive approach to the rights of NGO´s, especially their right to take action, is no longer a tenable position.

Overall results:

1. For the decision to deliberately release GMO into the environment, in Germany and Europe several authorities are responsible. However, the Federal Agency for Consumer Protection and Food Safety (Bundesamt für Verbraucherschutz und Lebensmittelsicherheit – BVL) is the leading agency, even regarding procedural steps originating from the law concerning nature conservation.

   The deliberate release of GMO´s within sites protected according the Birds or Habitats Directives (Natura 2000 sites) is subject to appropriate assessment of its implications for the habitat as described in Article 6 of the Habitats Directive (Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora). This assessment is to be conducted with the assistance of the Federal Agency for Nature Conservation (Bundesamt fuer Naturschutz, BfN) and the local authorities responsible for nature conservation. For this assessment it will be crucial to establish binding guidelines.

Nature reserves that are protected under German law are not subject to such an assessment, even though, it is indicated here as well.

After releasing the GMO, regional authorities still have the competence (on certain occasions) to temporarily withdraw the permission to release a GMO. The BVL, nevertheless, has to take the last decision.

2. The procedures leading to the decision to place GMO´s on the market are strongly influenced by European law (for instance Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC; Regulation 2003/1829/EC of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed). Regional authorities do not take part in them. Which regulation is applicable in a certain situation, depends on the product that has to be licensed. This, however, yields a hitherto unresolved problem when it comes to the authorisation of seeds. Here, contrary to the rule of law, the applicant decides with his application about the regulatory system he exposes himself to. Clearly, this practice contradicts the principle of legal certainty.

   As for the interest of nature conservation, it has to be acknowledged that direct and indirect impacts of a GMO on nature are part of the overall risk assessment of the GMO. The law concerning nature conservation is not directly applicable here, as it refers to certain areas (e.g. nature reserves protected under German law) and certain species. The permission to place a GMO on the market, however, can be relevant for permission that originates in the Federal and Laender law concerning nature conservation and might be necessary for the cultivation of transgenic plants. Direct and indirect impacts of a GMO that have already been assessed during its authorisation-process to obtain the permission to place the GMO on the market shall be excluded from subsequent authorisation-processes.

3. Once the permission on placing a GMO on the market has been granted, German law provides federal authorities with limited competences regarding the use of the authorised GMO.

   Similarly, regional authorities only have limited competences. But, they are allowed to intervene when it comes to the cultivation of transgenic plants that are authorised to be placed on the market within the above mentioned habitats or nature reserves protected under German law. The use of a GMO can, then, be prohibited by regional authorities whenever a regulation concerning nature conservation has been infringed.

   According to section 34a Nr. 2 of the German Federal Nature Conservation Act, the art. 6-assessment has to be conducted by the authorities for nature conservation. The BVL has to assist this assessment and provide all the relevant information public registers have to offer. The assessment of the significant effects on a habitat has to refer to the content of the permission to place a GMO on the market. According to the principle of “praktische Konkordanz” (which requires a weighting of contradictory interests), restrictions of the cultivation of GMO´s based on the law concerning natural conservation are possible only if the permission to place a GMO on the market does not include an examination of its impacts on a certain habitat.

Neither the Habitats Directive nor section 34a Nr. 2 of the German Federal Nature Conservation Act is applicable to nature reserves protected under German law. Therefore, only the by-laws of these reserves can possibly be infringed by the cultivation of GMO within it. A by-law might, e.g., prohibit the use of pesticides and according to recent case-law, the use of Bt-GMO (e.g. MON 810) has to be qualified as the use of pesticide. However, even if a by-law prohibits the use of pesticides within a biological reserve, the content of the permission to place a GMO on the market has to be taken into account as described above.

Besides that, the regional authorities concerned with natural conservation and the legislator have the competence to ban the use of transgenic plants in certain areas, such as biological reserves. There is urgent need for action. Here, consumers and NGO´s can only apply political pressure on the abovementioned regional authorities and the legislator.

4. The art. 6-assessment does not impart third party protection. Similarly, sections 25 and 26 of the law concerning gene technology ("Gentechnikgesetz – GenTG") can only partially be enforced by third parties. In these cases, however, the courts rather tend to refuse third party protection with the argument that third parties may take civil action instead.

5. The mobilization of communities against the release of GMO´s does not promise considerable potential for success. Politically, NGO´s should instead try to convince regional authorities concerned with natural conservation to administer the above-mentioned competences.

   Interests of nature conservation will, similarly, not be helpful for individual suits against the use of transgenic plants. Such claims often fail, as individuals under German law, even if they neighbour areas in which transgenic plants are cultivated, are generally not supposed to take legal action referring to environmental damages. They cannot invoke the art. 6-assessment procedural rules aiming at processes within or between authorities or the objective that transgenic plants should coexist with conventional and organic crops.

   These are the reasons why first and foremost political change is implied, particularly with regard to German administrative procedural law which has to be adapted to the predominant tendencies of European and International law. The right to have access to a review procedure before a court of law to challenge the substantive and procedural legality of any decision needs to be strengthened, especially according to international Aarhus Convention.

   The case law concerning apicultural interests could be a useful tool to pursue interests of nature conservation. NGO´s should encourage the establishment of rules for a code of practice ("gute fachliche Praxis") concerning apiculture to prevent a subtle and comprehensive contamination of honey with traces of GMO that could undermine the regime set up by Regulation (EC) No. 1829/2003 of the European Parliament and of the Council 22 September 2003 on genetically modified food and feed. Here, the legislator may no longer withdraw from his responsibility to set up a well balanced regime for the highly problematic coexistence of transgenic plants and apiculture.

6. As mentioned above, according to recent German case-law, the use of Bt-GMO (e.g. MON 810) has to be qualified as the use of pesticide. Therefore,

there is now the possibility to challenge the legality of permissions to deliberately release GMO´s and the use of transgenic plants after they have been permitted to be placed on the market, i.e. as long as the GMO is cultivated within a Natura 2000 site or a nature reserve under German law in which the use of pesticides is prohibited (e.g. in the management plan).

7. Politically, the endeavour to enhance public participation in decision making can take place on many levels.

   The adoption of rights concerning public participation under German law and the access to justice in environmental matters to the requirements of the Aarhus Convention should be furthered. Germany should, however, also be prompted to ratify the Almaty-Amendment. At the moment, only the European Union is taking part in this amendment to the Aarhus Convention. There will, therefore, be legislatorial activity that member states sooner or later have to comply with as soon as the Almaty-Amendment has entered into force. However, if Germany ratified the Almaty-Amendment itself, the pressure to comply with it would start with its entry into force.

   There are also many ways to challenge the case law surrounding sections 34a, 60 and 61 of the Federal Nature Conservation Act that might draw attention to the shortcomings of German administrative procedural law.

   The Almaty-Amendment, however, has to be considered a milestone for the right of NGOs (and maybe even third parties) to challenge the legality of permits to deliberately release GMO and permits to place GMO on the market. There will even be a need for action to extend the scope of the judicial examination of these permits.

The whole study is available under:

http://www.nabu.de/themen/gentechnik/studien/10305.html

For questions: Prof. Dr. Felix Ekardt, LL.M., M.A., fekardt@uni-bremen.de

For further requests please contact:

Dr. Steffi Ober
NABU-Bundesgeschäftsstelle
Charitestraße 3
10117 Berlin
Germany
Tel: +49 (0)30 .28 49 84 -1612
Mobile: 0172.52 54 19 78
E-mail: Steffi.Ober@NABU.de