



Comité européen de droit  
rural – European Council  
for Rural Law – Europäische  
Gesellschaft für Agrarrecht  
und das Recht des ländlichen  
Raums

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**Congrès européen de droit rural – 11–14 septembre 2013  
Lucerne (Suisse)**

**European Congress on Rural Law – 11–14 September 2013  
Lucerne (Switzerland)**

**Europäischer Agrarrechtskongress – 11.-14. September 2013  
Luzern (Schweiz)**

organisé sous la direction du C.E.D.R. par la Société Suisse de Droit Agraire et  
l'Université de Lucerne – organised under the direction of the C.E.D.R. by the  
Swiss Society for Rural Law and the University of Lucerne – organisiert unter  
der Leitung des C.E.D.R. durch die Schweizerische Gesellschaft für Agrarrecht  
und die Universität Luzern

## **Commission II**

### **GMO-free regions in Poland in domestic legislation**

#### **Individual report**

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## I. Introductory comments

The matter of admissibility of broadly defined application of genetically modified organisms raises many controversies in Poland. At the same time in default of substantial content-related public debate, many myths, ambiguities and misgivings have arisen about the issue.

Meanwhile the range of problems concerning application of genetically modified organisms is of higher and higher importance, and at the level of the European Union it has waited numerous and detailed legal regulations. First of all the regulations in concern covers:

- Directive 2009/41/EC of the European Parliament and of the Council of 6 May 2009 on the contained use of genetically modified micro-organisms<sup>1</sup>;
- 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 Directive 90/220/EEC of the Council<sup>2</sup>;
- Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed<sup>3</sup>;

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<sup>1</sup> OJ 2001 L 106 of EU of 21 May 2009

<sup>2</sup> OJ 2001 L 106 of EU of 17 April 2001, as further amended

<sup>3</sup> OJ 2001 L 286 of EU of 18 October 2003

- Council Directive 2002/53/EC of the Council of 13 June 2002 on the common catalogue of varieties of agricultural plant species<sup>4</sup>. EWG (OJ 2001 L 106, p. 1)

All regulations of the European Union specified above admit, either directly, or indirectly the possibility of applying various types of restrictions relating to: closed system of use of genetically modified organisms, deliberate release into the environment of genetically modified organisms, placing on the market of GMO products, or cultivation of genetically modified plants.

However, none of these regulations defines *expressis verbis* the concept of “GMO-free regions”. But, it appears that it is of various meanings. *Sensu stricte* of “GMO-free regions” will cover a definite territory within which genetically modified organisms are not generated purposed for deliberate release to the environment. Broad meaning of “GMO-free regions” would cover a territory within which genetically modified organisms are not only not generated in order to deliberate release to the environment, but their closed use, placing on the market or processing of them are also prohibited.

This individual report will be centred about presentation of the Polish internal legislation with regard to the aspect of establishing and operation of GMO-free regions within the territory of the Republic of Poland.

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<sup>4</sup> OJ 2001 L 193 of EU of 20 July 2002

## **II. General line of the Government of the Republic of Poland (the RP Government) relating to genetically modified organisms.**

On 18 November 2008 the Cabinet of the Republic of Poland adopted a document determining „General line of the Government of the Republic of Poland relating to genetically modified organisms (GMO)”<sup>5</sup>. The document constitutes a specific policy declaration of the RP Government concerning the range of issues:

- deliberate use of genetically modified organisms within the territory of the Republic of Poland (the RP);
- deliberate release into the environment of genetically modified organisms for experimental purposes within the territory of the RP;
- placing on the market of GM products within the territory of the RP;
- cultivation of GM plants varieties<sup>6</sup> within the territory of the RP.

Pursuant to the above document the Government of Poland supports conducting the researches the closed use of GMO under the terms stipulated in legal regulations.

Moreover, the RP Government has indicated that with regard to placing on the market of GMO as a product or GMO in products within the territory of the European Union system of authorization is obligatory. The rules for placing on the market of genetically modified products which can be applied in processing and industry are governed by the regulations of Directive 2001/18/EC of the European Parliament and of the Council. On the other hand, terms of admissibility for trade of

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<sup>5</sup> Adoption of the document in concern followed “General line of Poland relating to GMO genetically modified organisms” prepared in the year 2006, containing the same declaration.

<sup>6</sup> The contents of the document misquotes it refers to genetically modified “species”.

genetically modified food and forages are identified by Directive (EU) no. 1829/2003.

At the same time, the RP Government has expressed its conviction that the regulations of the European Union cited above impose very rigorous requirements for placing GMO products on the Community market and moreover those requirements are deemed to be the most rigorous ones worldwide. However, in addition, the RP Government has declared that taking into consideration the obligations of Poland under the membership in the European Union the RP Government commits itself to observe the European Union law applicable within the scope in concern. But participating in voting in the European Union the RP Government will express the negative position on placing GMO on the market as food, forages and other products.

Additionally, the RP Government has indicated in its line it seeks Poland to gain the status of “GMO-free country” and that is why the RP Government disagrees for providing the deliberate release of GMO into the environment for experimental purposes. However, on the other hand, considering the obligations resulting from the membership of Poland in the Union, the RP Government declares to comply with the applicable law of the European Union with regard to the deliberate release of genetically modified organisms into the environment for experimental purposes. The RP Government considers for experiments, especially, to obtain agricultural-environmental results relating to the impact of genetically modified organisms on to the environment in the climate conditions of Poland, performed by scientific institutions and universities.

In the analyzed line, the RP Government has been against placing on the market including opportune cultivation of genetically modified plants. At the same time, the RP Government has indicated that taking part in authorization procedure as well as in voting on the forum of the European Union, the RP Government will express its negative line voting against placing on the market including opportune cultivation of new plants genetically modified. But taking into consideration the obligations of Poland under the membership in the Community the RP Government commits itself to observe the European Union law applicable within the scope in concern.

The RP Government line showed herein above is to be deemed at best as inconsistent and unstable. On the one hand the Government of Poland commits itself to observe the law of the European Union, and on the other hand it *a priori* predicts the Polish authorities will express the negative position on placing GMO in a broad sense on the market within the territory of the European Union. As it is, the EU legislation seeks an entirely different direction, i.e. it brings about “global” opportunity for wide use of GMO providing exclusions resulting from the need to protect such values as protection of human health and the environment.

In addition, nearly in a way entirely irrelevant to the European Union legislation under the analysis, the RP Government declares the seeks to obtain a status of “GMO-free country” by Poland. However, the RP Government fails to define what such status would signify. It is also hard to conclude, not analyzing the Polish specific legislation, in what way Poland is to achieve the status, while functioning in compliance with the

law of the European Union, which deems GMO-free regions rather as extraordinary situations.

### **III. Polish legislation covering GMO-s range of problems.**

In the Polish legislation the range of problems relating to: closed system of use of genetically modified organisms, deliberate release of GMO-s into the environment for purposes other than placing on the market, placing of GMO products on the market, export and transit of GMO products is regulated by the Act of 22 June 2001 on genetically modified organisms <sup>7</sup>. Pursuant to the regulations of the above cited legislative act taking all actions of the above specified ones requires to obtain, respectively: a consent (in the case of deliberate release of GMO-s into the environment and in the case of closed system of use of GMO) or an authorisation (in the case of placing of GMO products on the market as well as export and transit of GMO products) issued by a competent environment minister.

The regulations of the Act on genetically modified organisms give no definition of the concept of “GMO-free regions”, moreover the content of the regulations includes no provision allowing to establish any areas where obtaining a consent or an authorization referred to herein above. Quite the contrary, the Act institutes a rule that a decision on the possibility of closed system of use of genetically modified organisms, deliberate release of GMO-s into the environment for purposes other than

placing on the market, placing of GMO products on the market, export and transit of GMO products is made following an analysis conducted on a case by case basis, as well as when a particular entity – a user of GMOs satisfies a number of requirements, which are to ensure safety of human health and safety of the environment.

Thus, the content of the regulations of the Act on genetically modified organisms remains in undoubted conflict with the general line of the RP Government which has declared the seek to gain by Poland the status of “GMO-free country” with regard to the aspect of the deliberate release of GMO into the environment.

However, considering the range of issues with regard to “GMO-free regions” within the territory of Poland, it is to pay peculiar attention to the aspect relating to the possibility of cultivation of genetically modified plants within the territory of the Republic of Poland.

The range of issues *inter alia* with regard to registration of agricultural plant species as well as admissibility for trade of the seeds within the territory of Poland is currently governed by the regulations of the Law on Seeds of 9 November 2012<sup>8</sup>. The Law on Seeds became effective as of 28 January 2013 and repealed the previously binding Law on Seeds of 26 June 2003<sup>9</sup>.

With regard to the aspect of the possibility to establish GMO-free regions within the territory of Poland, evolution of the above specified regulations that was carried out last years is of peculiar importance.

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<sup>7</sup> Consolidated text: Official Journal: Dz. U. of 2007, No. 36, pos. 233, as further amended

<sup>8</sup> Official Journal: Dz. U. of 2012, No. 1512

<sup>9</sup> Consolidated text: Official Journal: Dz. U. of 2007, No. 41, pos. 271, as further amended

The Law on Seeds<sup>10</sup> of 26 June 2003 in its primary form introduced no limits with regard to placing on the market and use within the territory of Poland of genetically modified seed varieties. On the contrary, the regulations of the Law admitted outright such possibility. Pursuant to the regulations of art. 57, sec. 3 of the Law on Seeds (in the primary wording):

*“Genetically modified varieties may be admitted for placing on the market after requirements specified in the regulations relating to genetically modified organisms have been satisfied.”*

Moreover, the regulations of art. 64, sec. 2 of the Law pointed out, as follows:

*“If the seed referred to in sec. 1 item 2, is genetically modified, it may be brought in after the requirements determined in the regulations on genetically modified organisms have been satisfied.”*

Thus, the regulations of the Law on Seeds of 26 June 2003 also instituted no regulations allowing establishing GMO-free regions within the territory of the Republic of Poland. Genetically modified seed varieties were governed by the regulations of the Act of 22 June 2001 on genetically modified organisms.

The situation was radically changed as of 2 July 2006, i.e. as of the effective date of the regulations of the Act of 27 April 2006 on amendment of the Law of Seeds and the Act on protection of plants<sup>11</sup>. The referred amendment is to be directly connected with adjustment on 3

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<sup>10</sup> Official Journal: Dz. U. of 2003, No. 137, pos. 1299

<sup>11</sup> Official Journal: Dz. U. of 2006, No. 92, pos. 639

April 2006 of the first version of a document named: “General line of Poland relating to GMO genetically modified organisms”.

The amendment indicated herein above has instituted a new regulation of art. 5 sec. 4 of the wording:

*“Genetically modified varieties shall not be entered into the national catalogue.”*

At the same time the Polish legislator has amended the content of art. 57 sec. 4 of the Law on Seeds giving the wording quite opposite to the hitherto, namely deciding that:

*“Genetically modified seed varieties may not be admitted to trade within the territory of the Republic of Poland.”*

Therefore, in view of coming into force of the above mentioned regulation, as a matter of fact, Poland has become “GMO-free country” with regard to the aspect of placing on the market and cultivation of genetically modified plants.

The regulations provided above were challenged by the European Commission as inconsistent with 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 as well as the Council Directive 2002/53/EC of the Council of 13 June 2002 on the common catalogue of varieties of agricultural plant species. The European Commission sent Poland a letter of formal notice relating to the alleged infringement disclosed. In response to the notice the Polish party denied existence of the infringements.

In consequence the European Commission brought an action against Poland before the European Court of Justice (ECJ). In that action the European Committee alleged Poland that the regulation indicated herein above, prohibiting the trade of genetically modified seed varieties within the territory of Poland was inconsistent with art. 22 and 23 of Directive no. 2001/18/EU, as well as with art. 16 of Directive no. 2002/53/EU.

The European Committee argued in its action that pursuant to the above specified regulations of the European Union none of its Member States might not to implement any marketing restrictions towards genetically modified organisms, if they had been authorised in compliance with the procedures laid down in the above mentioned directives. At the same time, the European Committee indicated that the both Directives cited establish exceptions from the above mentioned rule named “protective clauses”. In the case of Directive no. 2001/18/EC that clause allows to establish prohibitions and restrictions relating to placing GMO on the market merely in the situation when a Member State has scientific evidences allowing to regard that a given GMO product presents the risk to human health or to the environment. In the case of Directive no. 2001/18/EC the protective clause has been formalized in a way which allows to establish in a given Member State a prohibition to apply genetically modified plants within the entire territory of such Member State or in its parts, merely where:

- official growing trials carried out in a given Member State show that the variety does not, in any part of its territory, produce results corresponding to those obtained from a comparable variety accepted in the territory of that Member State, or

- it is well known that the variety of GMO is not suitable for cultivation in any part of its territory because of its type of maturity class, or
- there are material reasons for considering that the variety of GMO presents a risk to human health or the environment.

Moreover, it is to emphasize that in the case of both protective clauses the restrictions provided by them must refer to a particular GMO product, in the case analysed to a particular plant variety, but not to all varieties of genetically modified plants.

In the opinion of the European Commission the Polish regulation called into question failed to satisfy the above specified regulations of the European Commission, and in particulars, it was not covered by none of the protective clauses presented herein above.

Poland defended the above complaints relaying on the precautionary principle and on the risks of irreversible consequences due to placing of genetically modified varieties for biodiversity and the environment in general and consequently for the Polish agricultural sector. Poland also raised that the regulations of Directive no. 2001/18/EC included the inadequate and incomplete provisions with regards the rules of assessment, controls and safeguards purposed for use of genetically modified plants, as well as regards its rules concerning the co-existence of cultures of modified plants and traditional varieties. Moreover, the Polish party referred to the need to respect ethical principles in implementation process of GMO in a given Member State of the European Union, and in the case of Poland the introduction into the Polish legal system of provisions to which most of the Polish people were opposed would be unethical. Specific emphasize in the defence of

its position was put by the Republic of Poland right on the provisions of art. 30 of the Treaty on the European Union indicating that adoption of the challenged national regulations resulted from the national legislator's concern about the Christian and Humanist ethical principles.

By virtue of the decision of 16 July 2009 relating to the case no. C-168/08 (The European Commission versus the Republic of Poland)<sup>12</sup> ECJ regarded that by prohibiting free circulation of genetically modified seed varieties and inclusion of genetically modified varieties in the national common catalogue, the Republic of Poland had failed to fulfil its obligations under Articles 22 and 23 of Directive of the European Parliament and the Council no. 2001/18/EC of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Directive 90/220/ECC of the Council, as well as under Articles 4 (4) and 16 Directive 2002/53/EC of the Council of 13 June 2002 on the common catalogue of varieties of agricultural plant species.

ECJ has indicated the Member State which prohibits free circulation of genetically modified seed varieties and inclusion of genetically modified varieties in the national common catalogue breaches its obligations under Articles 22 and 23 of Directive no. 2001/18 on the deliberate release into the environment of genetically modified organisms and repealing Directive 90/220, as well as under the Articles 4 (4) and 16 of Directive no. 2002/53 on the common catalogue of varieties of agricultural plant species.

With regard to Directive no. 2001/18, its Articles 22 and 23 place the Member States under an obligation not to prohibit, restrict or impede the

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<sup>12</sup> Files of the case-law of the European Court of 2009, p. I-06843

placing on the market of genetically modified organisms (GMOs), as or in products, which comply with the requirements of that directive, save where, in accordance with the specific provisions laid down in that respect by Article 23 of that directive, they rely on the possibility of adopting the safeguard measures provided for there under. A national measure which unilaterally imposes a general prohibition on the marketing of GMO seed, clearly infringes the quoted Articles 22 and 23.

Such a general prohibition also clearly infringes Article 16 sec.1 of Directive 2002/53, which places the Member States under an obligation not to make seed varieties accepted in accordance with that directive subject to any marketing restrictions relating to variety, unless they rely on the exceptions set out in Article 16 sec. 2. It is common ground in that regard that a certain number of varieties which have been accepted in accordance with Directive 2002/53 and which accordingly appear in the common catalogue, referred to in Article 17 thereof, are genetically modified varieties.

Besides, from Article 4 sec. 4 of Directive 2002/53 results in particular that the inclusion of genetically modified varieties in the national catalogue of varieties cannot be the subject of a general prohibition. It emerges, in particular, from Article 4 sec. 4 that any refusal to include a variety in the national catalogue solely because it is genetically modified is justified only if there has been a failure to take all appropriate measures to prevent adverse effects on human health, which cannot, in particular, be the case where a variety has been authorised under the provisions of Directive 2001/18.

The elaborated decision of ECJ has been taken into consideration by the Republic of Poland. On 28 January 2013 the challenged provisions of Law on Seeds of 26 June 2003 have become invalid under the entire Law being repealed by the new Law on Seeds of 9 November 2012.

The referred Law has already included no general prohibition of the placing on the market of seeds of genetically modified plant varieties. Instead of the provisions challenged by the European Commission and ECJ of the Law on Seeds previously effective, the Polish legislator has introduced Article 104 sec. 9 of the new Law on Seeds under which:

*„The Cabinet may, by virtue of a decree, establish the prohibition to apply the seeds of determined varieties, considering their uselessness for cultivation in climatic and soil conditions of the Republic of Poland, or necessity to avoid the risks to human, animal and plant health and the environment.”*

Hitherto, by virtue of the above provisions, the Council of the Republic of Poland issued two decrees only:

- of 2 January 2013 on the prohibition to use the seed of MON 810 corn varieties<sup>13</sup>, and
- of 2 January 2013 on the prohibition to use the seed of Amflora potato varieties<sup>14</sup>.

The both decrees specified herein above provide the prohibition to use the genetically modified seed varieties. As far as they are the only GMO varieties admitted for marketing within the territory of the European Union, in point of fact, Poland has become “GMOs-free

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<sup>13</sup> Official Journal: Dz. U. of 2013, No. 39

<sup>14</sup> Official Journal: Dz. U. of 2013, No. 27

country” with regard to the aspect of admissibility to use circulation of genetically modified seed varieties.

#### **IV. Conclusions**

To summarise, it is to state that the Polish national regulations provide no definition of the concept of “GMOs-free region”. The analysis of applicable legislation indicates to the fact that Poland has not established outright and directly such regions, in particular concerning: deliberate use of genetically modified organisms within the territory of the Republic of Poland, deliberate release into the environment of genetically modified organisms, placing on the market of GM products.

The different situation appears in the case of admissibility of cultivation of genetically modified plant varieties within the territory of the Republic of Poland. In this case, in point of fact, Poland has become “GMOs-free region”. The restrictions provided with regard to this issue have already had no primary defect in a form of their clear inconsistency with the law of the European Union, as they are not of global nature. However, still open to question is whether the reasons indicated by the Polish legislator in favour of restriction to market seed of particular genetically modified plants within the territory of the Republic of Poland can contained in admissible limits under the protective clauses of Directive 2001/18/EC of the European Parliament and the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Directive 90/220/EEC of the Council and Directive 2002/53/EC of the Council of 13 June 2002 on the

common catalogue of varieties of agricultural plant species. It may arise some doubts especially after the reading of argumentations of regulation drafts above specified which in large degree are based on the scientific argumentation of the Republic of Hungary and the Republic of Austria, however not supported by specific domestic scientific researches.