CO-EXTRA

GM and non-GM supply chains: their CO-EXistence and TRAceability

Project number: 007158

Integrated project
Sixth Framework Programme
Priority 5
Food Quality and Safety

Deliverable D7.2

Title: Report on the analysis of trans-border issues with GMOs

Due date of deliverable: M12

Actual submission date: M37

Start date of the project: April 1st, 2005 **Duration**: 48 months

Organisation name of lead contractor: USFD

Revision: VFinal

Project co-funded by the European Commission within the Sixth Framework Programme (2002-2006)	
Dissemination Level	
PU Public	
PP Restricted to other programme participants (including the Commission Services)	
RE Restricted to a group specified by the consortium (including the Commission Services)	
CO Confidential, only for members of the consortium (including the Commission Services)	

Table of Contents

Summary

Report on the analysis of trans-border issues with GMOs.

A Report on Cross-Border Liability Issues with GMOs – A Hypothetical Case Study

1.1.1 Introduction

In July 2003 the Commission adopted Recommendation 2003/556/EC[1] requiring Member States to introduce national strategies and methods to deal with the co-existence of genetically modified (GM) crops with non-GM crops and organic agriculture. The Recommendation contains a list of general principles[2] that Member States are advised to take into account when developing national strategies and includes considerations of transparency, scientific knowledge, proportionality, scale, specificity of measures, policy and liability rules. In accordance with Recommendation 2003/556 the Commission reported to the Council and the European Parliament in 2005 on the implementation of national strategies across the EU. The Commission Report[3] provides the basis for describing the national liability regimes which Member States have introduced or are in the process of introducing into national legislation. The recommendation also requires Member States to *ensure cross-border co-operation with neighbouring countries to guarantee the effective functioning of co-existence measures in border areas.* To date no Member State has addressed the issue of cross-border co-operation with respect to liability and redress.

This case study will consider how a claim concerning cross-border contamination between genetically modified and non-GM crops (including organically grown crops), between Denmark and Germany would unfold; it will not provide an in depth assessment of co-existence regimes.

The choice of Germany and Denmark is in part as they are two of a very limited number of Member States that have in fact implemented coexistence legislation, but primarily because

[1] Commission Recommendation of 23 July 2003 on guidelines for the development of national strategies and best practices to ensure the co-existence of genetically modified crops with conventional and organic farming, Official Journal L 189, 29/07/2003, p.36
[2] ibid. at section 2
[3] Commission Staff Working Document, Annex to the Communication from the Commission to the Council and the European Parliament, Report on the implementation of national measures on the coexistence of genetically modified crops with conventional and organic farming, COM(2006) 104.

of the fundamentally different approaches each has taken towards liability and redress. Germany has elected to modify its conventional rules on civil liability and provide for preventative regulations, while Denmark has nominated to establish a compensation scheme, funded by an initial donation from the Danish Government and maintained by a mandatory contribution from all farmers growing GM crops.

The inclusion of Denmark has rendered the approach to the determination of jurisdiction somewhat unique, given that the Kingdom is party to the Brussels *Convention* on jurisdiction and enforcement of civil and commercial matters, rather than the more recent Brussels *Regulations*[4] governing the same area. Consequently, in any matter of inter-State jurisdiction arising between Denmark and a State signed to the Convention *and* subject to the Regulation, the Convention is applied.

However, while there are differences between the Convention and the Regulation, such differences are by no means crucial, and have little impact on the scenario(s) under discussion. In addition, Denmark is negotiating a protocol to accede to Regulation 44/2001 and as such it is likely that Regulation 44/2001 will apply to Denmark in the near future.

This report will look at a specific scenario, contamination of a non-GM crop (either conventional or organic) in Germany by a GM crop grown in Denmark, and the reciprocal situation. Jurisdiction of the dispute will be determined by applying Regulation 44/2001 followed by a discussion of respective Danish and German systems and the application of appropriate national law.

1 Scenario Details

The details of the scenario will be built upon with the increasingly intricate details of both law and fact, however two aspects of the scenario will remain constant. The level of GM contamination in the non-GM crop will be above 0.9%, as per Article 12(2) Regulation 1829/2003[5], in order for a claim to be actionable. While there is discussion of a threshold of

[4] Council Regulation N° 44/2001
[5] Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed OJ L 268 18/10/2003

contamination for *organic* crops to be lower, this has not yet happened. As such, it will be assumed that the level of contamination is above 0.9%.

Secondly, both parties to the disputes will be considered to be domiciled in their respective countries. There is little to be gained from considering whether the parties are not domiciled in Denmark or Germany, as this case study is designed to determine the outcome of cases in which the law of Denmark or Germany is applied: where they are *not* domiciled in that State, they would not, under the facts of this scenario, be subject to the laws of Denmark or Germany.

The following assumptions will also be made for each scenario: the crop is maize; the farm's relevant fields are adjoining; there is no prior agreement between the farmers concerning cross-contamination.

The following scenarios will be considered:

- Two farms, one growing GM crops, one crowing conventional crops
    - Claimant farm in Denmark/defendant farm in Germany
    - Claimant farm in German/defendant farm in Denmark
    - Multiple defendants using GM;
    - Organic, rather than conventional, claimant;

2 Determination of Jurisdiction – The Brussels Convention/Regulation

The Brussels Convention is designed to determine the State jurisdiction of civil proceedings, whatever the court or tribunal, and specifically does *not* cover revenue or administration matters.[6]

[6] Article 1

The general rule concerning the determination of jurisdiction within the Convention is that "persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that state"[7]. A member State court before which a defendant enters an appearance will have jurisdiction, except where jurisdiction is derived from other provisions of the Convention.[8] This means that where the defendant has a domicile in a Member State, the claimant must establish jurisdiction under the Regulation unless expressly provided for by the convention. So in general the defendant is to be sued in the courts of their domicile.

However, derogation from the general rule is provided for in several instances relevant to this scenario.

The most relevant provision is Article 5(3), which states that a person domiciled in a contracting state may be sued in the courts of another contracting state "in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred." This article is open to a wide variety of interpretations, the precise meaning and scope of which has been defined further through the European courts.

The European Court of Justice (ECJ), in *Kalfelis v Bankhaus Schroder,*[9] determined that the term "tort, delict and quasi-delict" effectively "covers all actions which seek to establish the liability of a defendant and which are not related to a "contract"…"[10]. In other words all actions between parties where no contract or prior agreement exists.

A clarification of the phrase "in the courts for the place where the harmful event occurred" was provided in *Handelskwerkerij G. J Bier B and Another v Mines de Potasse D'Alsace S.A*[11], which stated that the term must be interpreted as being "intended to cover both the place where the damage occurred and the place of the event giving rise to it".[12] Therefore, "the choice of forum belong[s] to the plaintiff whom the Convention seeks to protect".[13] This suggests that the plaintiff can choose whether to sue in the Member State where the damage

[7] Article 2
[8] Article 18
[9] Case 189/87 [1988] ECR 5565
[10] ibid [17]
[11] Case 21/76 [1978] QB 708
[12] ibid at p.731 [24]
[13] International Law Commission *Survey of Liability Regimes Relevant to the Topic of International Liability for Injurious Consequences Arising out of Acts Not Prohibited by International Law (International Liability in case of Loss From Transboundary Harm Arising Out of Hazardous Activities)* (A/CN.4/543) Geneva 2004 at p.114 [333]

arose (where the GM crop was grown) or in the Member States where the damage occurred (where the contamination of the non-GM crop occurred).

Article 16 deals with the matter of exclusive jurisdiction and immovable property, providing that, regardless of domicile "in proceedings which have as their objects rights *in rem* in immovable property…the courts of the contracting state in which the property is situated" shall have exclusive jurisdiction.[14] This may have major ramifications where the claimant is an organic farmer, and will be returned to below.

A brief comment should be made on the recognition and enforcement of judgements between Contracting Parties. Article 26 of the Brussels Convention states that "a judgement given in a Contracting State shall be recognized in the other Contracting States without any special procedure being required", while Article 29 provides that "under no circumstances may a foreign judgement be reviewed as to its substance".

However, there *are* instances whereby a judgment may not be recognised between contracting states. Article 27 lists these circumstances; possibly relevant to this case study is Article 27(1), which notes that if a judgement is "…contrary to public policy in the state in which recognition is sought", such a judgement shall not be recognized. There are minimal circumstances where this may be the case. Nevertheless, this may occur where a judgement is, for example, handed down to a Danish claimant in a German court, and such a judgment provides for a radically different remedy than those available in Denmark.[15] This is, however, pure speculation: Article 27 does not give any indication as to what constitutes "public policy" in these circumstances, and guess as to the policy considerations Denmark and Germany may have in relation to cross-border GM contamination.

[14] Article 16(1)(a)
[15] see page … for a discussion concerning the relative remedies available in each nation's co-existence regimes

3 Scenario Evaluation: Decision of Jurisdiction and Application of National Law

Although the general rule states that the defendant is to be sued in the courts of their domicile, it seems likely that cross-border contamination will fall under one of the derogations from the general rule and permit the claimant to select the jurisdiction[16].

However, there are two exceptions to this: if *immovable* property is damaged, exclusive jurisdiction is granted to the courts of the nation in which the immovable property is located; secondly, if there is a prior agreement between the relevant parties as to the forum.

Initially, issues surrounding immovable property do not appear to be relevant to cross-border GM crop contamination. However, where the claimant is an *organic* farmer, crop contamination does not merely damage that year's harvest; the farmer may loose organic certification of that land. It is the *land* that is contaminated, and therefore damaged, as a result of contamination, not simply the crop. Therefore, in a scenario in which the claimant is an organic farmer, the likelihood is that the courts of the nation in which the organic farm is located will have jurisdiction.

It is possible that a prior agreement as to the forum in which a claim will be based will be settled between a group of GM and non-GM farmers. However, the reasoning behind such an agreement will not be considered in great detail, as it is beyond the scope of this paper; our concern is with the allocation of jurisdiction and the consequences of that allocation. The *motivation* behind such an agreement is not relevant here. It is enough to know that this is a possible factor and will not be discussed further.

However, in most situations, the choice of forum would be for the claimant to decide and, it seems very reasonable to assume that a claimant would choose on the basis of the likelihood of a successful outcome for his claim.

Consequently, the co-existence regimes of Denmark and Germany must be discussed both because one must understand them in order to apply them to the scenario facts, but also in order to identify *which* may be chosen over the other by a claimant and under what situations.

[16] As per *Kalfelis v Bankhaus Schroder* and *Handelskwerkerij G. J Bier B and Another v Mines de Potasse D'Alsace S.A*

When applying the hypothetical facts of the scenario in order to elucidate a possible outcome based on the legislative provisions, it must be borne in mind that there is no case law in this area and therefore ultimately it is for the courts to decide the outcome of cross-border contamination.

Additionally, it is important to bear in mind that there is technically a limited period of time in which current regulation would be applicable to the outlined facts: the Danish legislation is intended as a stop-gap measures until relevant insurance is in place, and there are a few more growing seasons left until the five year time limit is up. However, it is unlikely that affordable insurance will be in place for GM-cross contamination in the next two years, partly (and ironically) because it is extremely difficult to calculate the risk, and therefore the relevant premiums, of contamination in general and cross-contamination in particular.

Nevertheless, although the end of the five year time period is nearing, the availability of insurance seems very distant and it may be that the compensation fund may need to be extended.

3.1 The Danish System

The Danish system is primarily based on a compensation scheme, established under s.12 of the Danish Act on the Growing etc. of Genetically Modified Crops.

This scheme is funded exclusively by a "parafiscal tax"[17] (or a "cultivation fee"),[18] payable 100DKK per year per hectare on which GM crops are grown.[19]

Compensation is paid out of this fund to "any farmer who suffers a loss due to the occurrence of genetically modified material in his crops".[20] Application for compensation from this fund does not involve court proceedings.[21]

[17] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p8
[18] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p3
[19] s.12(1) Act on the Growing etc. of Genetically Modified Crops
[20] s.9(1) Act on the Growing etc. of Genetically Modified Crops
[21] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p6

There are numerous conditions which must be fulfilled before compensation is paid to a claiming farmer.

A GM crop of the same or related variety must have been grown within the same growing season within a specified area,[22] and the GM crop must be identifiable in the crop of the farmer suffering the loss.[23] In the case of contamination of an authorised organic crop, it is sufficient that GM material is present in the crop and it was grown in the same season: it is not required that a GM crop was grown within the specified area.[24] Where an organic farmer suffers a loss due to the presence of genetically modified *seed* in his seed for sowing, compensation shall be paid out in spite of any of these requirements.[25] Compensation will also be paid *regardless* of whether or not the farmer whose crop caused the contamination can be identified, in the case of both conventional and organic crops.[26]

The level of compensation granted is also restricted, and will not exceed the reduction in sales price of the crop (eligibility is restricted to primary production)[27] due to the occurrence of GM material (i.e. the price difference between a conventional crop and a GM crop, or an organic crop and a GM crop);[28] the costs for sampling and analysis;[29] any losses resulting from a requirement for conversion of organic areas due to the occurrence of GM material.[30] In the case of organic crops, compensation will cover the conversion period until production can once again be sold as organic. Such periods are determined by Danish Act nr.119 of 03/03/2006 on organic farming, and the compensation is, again, limited to price difference. The market sale price of a crop (GM, conventional and organic) is determined by the Danish authorities.[31]

Compensation will not be paid if the level of GM material present in the crop(s) of the claimant farmer does not exceed the limit laid down by the Danish authorities. That limit is 0.9%, as required under Article 12(2) Regulation 1829/2003.[32]

---

[22] s.9(1)(i) Act on the Growing etc. of Genetically Modified Crops
[23] s.9(1)(ii) Act on the Growing etc. of Genetically Modified Crops
[24] p4
[25] s.9(4) Act on the Growing etc. of Genetically Modified Crops
[26] p4
[27] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p4
[28] s.9(3)(i) Act on the Growing etc. of Genetically Modified Crops
[29] s.9(3)(ii) Act on the Growing etc. of Genetically Modified Crops
[30] s.9(3)(iii) Act on the Growing etc. of Genetically Modified Crops
[31] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p9
[32] Article 12(2)

Furthermore, there are very tight restrictions on the *time* at which a claim is made. Section 10(1) provides that all claims must be made "without undue delay" from the moment that it has come, or *should* have come to the attention of the claimant. The time limit is 14 days from this point,[33] and the claim must be filed by the 1st of August in the first calendar year after harvesting the crop.[34] Failure to abide by these provisions will automatically exclude the possibility of compensation being granted.

Where compensation *is* paid out, the Danish Minister for Food, Agriculture and Fisheries will be subrogated to any claims for damages the farmer suffering the loss may have against the person responsible for the loss, always provided that the farmer suffering loss shall retain his right to make a claim against the person responsible for the loss with regard to losses in excess of the compensation paid.[35]

Therefore, payment of compensation from the fund does not free the contaminating party from any civil or criminal liability under Danish law.[36] Indeed, in practice s.11[37] means that "in all cases, Danish authorities will take action to recover the compensation paid from the farmer from whose fields the GMO spread"[38] in the courts, seeking to recoup the loss to the fund through the civil liability system.

However, as the Danish civil liability system is fault based, a GM farmer who has adhered to the relevant coexistence measures and good farming practice will not be liable for any contamination caused and the Danish authorities will not take any action to recover compensation paid from the fund.

As Danish civil liability system is fault based there is a requirement to be able to identify the farmer who caused the damage. Consequently, while the Danish authorities have made it clear that they will seek to recoup losses in all cases, it is quite possible that while the

[33] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p4
[34] s.10(2) Act on the Growing etc. of Genetically Modified Crops
[35] S.11 Act on the Growing etc. of Genetically Modified Crops
[36] Commission Authorises Danish State Aid to Compensate for Losses Due to Presence of GMOs in Conventional and Organic Crops. Available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1458&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 15/03/2007)
[37] Act on the Growing etc. of Genetically Modified Crops
[38] Commission Authorises Danish State Aid to Compensate for Losses Due to Presence of GMOs in Conventional and Organic Crops. Available at: <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1458&format=HTML&aged=0&language=EN&guiLanguage=en> (accessed 15/03/2007)

compensation scheme would pay out (as it requires no fault to be identified), the courts may turn down a claim for damages by the authorities if no fault can be attributed.[39]

To summarise under the Danish system a non-GM farmer who has suffered loss due to contamination will be able to seek a remedy for these losses from the compensation fund. In addition, the farmer may seek further damages via the civil courts but is only likely to succeed if the farmer who has caused the damage can be identified and it can be shown that they have not followed the required coexistence measures (s.11[40]). Similarly the Danish authorities will only be able to recover compensation paid out from the fund if the GM farmer who has caused the contamination can be identified and has not followed coexistence measures.

The German System

The 2004 amendment to the German Genetic Modification Act attempted to "address the problem of coexistence both by preventive regulation and a modification of the liability rules of the law of neighbourhood relations",[41] by providing for an obligation to take precautionary action by means of following "good farming practice" (GFP) (under s.16b(2)). In addition, s.36a provides a clarification of the existing bases of claims in the civil law regarding neighbours, while under ss.906 and 1004 (neighbourhood liability) of the German Code of Civil Law (the *Bürgerliches Gesetzbuch* or "BGB") and s.823 BGB (general tort liability), "substantially modify" crucial elements of s.906 BGB[42]. This section does *not* create a new basis for a claim.[43]

The amendment outlines what constitutes GFP. For example, when utilising GM material, measures must be taken to avoid dispersal into other plots of land during sowing and harvesting, using minimum distances, variety selection, control of volunteers and natural pollen barriers.[44] GFP is further specified as including the separation of GM and non-GM crops during storage and transport, as well as cleaning containers and areas used during

[39] European Commission "State Aid: Denmark - Compensation for Losses Due to the Presence of Certain GMO Material" (Aid No N 568/04) p5
[40] Act on the Growing etc. of Genetically Modified Crops
[41] International Court of Environmental Arbitration and Conciliation, *Consultative Opinion on the Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops* (June 2005) p.30
[42] International Court of Environmental Arbitration and Conciliation, *Consultative Opinion on the Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops* (June 2005) p.30
[43] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.10
[44] s.16(b)(3)(1)

storage and transport.[45] Failure to comply with these practices will result in the farmer in question breaching the requirement for precautionary action under s.1(1) and (2).

However, to date regulations defining exactly what constitutes GFP have not yet been implemented.

One of the most important issues that the amendment addresses is that of civil liability. Section 36a makes it clear that the transfer of characteristics from a GM organism to a non-GM organism constitutes a "significant impairment" under s.906 BGB. The term "characteristics" does not refer to the expression of a particular genetic modification; rather, the presence of any GM material itself constitutes a transfer of "characteristics" sufficient to comprise a "significant impairment".

The law surrounding "significant impairment" under the BGB is complex. While these regulations are not *specifically* related to co-existence measures, it is vital to understand their meaning and use (at least to some degree) if the co-existence civil liability measures *themselves* are to be understood. The clarification that s.36a provides is aimed at creating "legal certainty".[46]

3.2 The BGB has both defensive (which concern the prohibition (either cessation or prevention) of certain acts) and compensatory claims regarding significant impairment.[47]

Sections 1004(1) and 862(1) BGB provide for defensive claims.

Section 1004(1) provides that: "if the owner of the property is interfered with, other than by removal or retention of possession, the owner may require the interfering party to remedy the impairment. If further interferences are to be feared, the owner may seek a prohibitory in junction"

[45] s.16(b)(3)(2) & (3)
[46] Germany's Genetic Modification Act - Information on the Amendment <http://www.bmelv.de/nn_757144/EN/10BiologicalDiversity/GermanyGeneticModificationAct.html> (accessed 13/07/06)
[47] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.10

Section 862(1) states that "if the possessor is disturbed due to unlawful impairment, he may require the interfering party to remedy the impairment. If further impairment is to be feared, the possessor may seek an injunction.

These provisions make no mention of fault or intention. As a result, they bestow a strict liability system. This strict liability does not relate to providing *compensation*. Rather, they provide for equitable remedies in order to halt or prevent impairment. Sections 1004(1) and 862(1) are given a wide interpretation. For example, in the context of contamination the pollination of susceptible plants (non-GM) by GM seeds and pollen (the transfer of characteristics from a GM organism to a non-GM organism) from neighbouring plots of land is considered sufficient.[48]

Compensatory claims are provided by ss.823(1)&(2).

Subsection 1 states that "anyone who intentionally or negligently causes unlawful injury, contrary to law, to the life, body, health, freedom, property, or any other right of another party, shall be liable for the damage thus incurred to that other party." In the context of this case study, this refers to a situation where the intentional/negligent actions of an individual have led to the claimant being unable to use (to its full extent, or intended purpose) his crop, i.e. the out crossing of GM organisms.[49]

Subsection 2 provides that this situation also applies where an individual breaches any law "aiming to protect another party". However, if such a law allows for a violation without fault, liability will only arise in cases of fault.[50]

An example of a law with such an aim is s.16b the Genetic Modification Act[51] , which states that those utilising GM material "…shall ensure that the legal objectives and interests referred to in s.1(1) and (2) are not significantly adversely affected by the transfer of

[48] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.12
[49] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.12
[50] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.12
[51] Another example is section 1004(1) read in conjunction with s.906(2) BGB, which are designed to protect parties against significant nuisance. This is returned to below.

characteristics of an organism that arise from genetic engineering work, by admixture or by other release of genetically modified organisms."

Clearly, both these subsections require *fault*, insofar as they require intentional or negligent behaviour, and unlike the defensive claims, they deal with monetary compensation, rather than physical injunctions. Thus, under these sections and in these circumstances, in order to acquire monetary compensation under the German system, one must demonstrate fault.

The defensive provisions of s.1004(1) and 862(1) are limited by s.1004(2) and s.823 respectively.

Section 1004(2) BGB states that "the claim is excluded if the owner is obliged to tolerate the interference". This affects s.862(1) as well as s.1004(1), as the protection of possession cannot be wider than the protection of property.[52] Section 823 BGB states that any violation *must* be unlawful; it is only unlawful if there is no obligation to tolerate the interference.

Section 906 BGB allows a party to prohibit their neighbour from effecting or continuing a significant impairment, where it is not customary for this impairment to occur, or where they *are* customary, where they can be reasonably prevented by physical means.[53]

Section 36a (1) of the Genetic Modification Act states that "the transfer of characteristics from an organism arising from genetic engineering work… shall constitute a significant impairment in the sense of Section 906 of the Code of Civil Law", while subsection (2) provides that "compliance with good professional practice under Section 16b (2) and (3) is deemed to be economically reasonable in the sense of Section 906 of the Code of Civil Law".

Under s.36a(1), the transfer of GM characteristics is held to constitute a significant impairment if (in particular) such transfer means the product

1) cannot be placed on the market, or

[52] A Schäfer "The German Co-Existence Legislation with Special Emphasis on Liability and Compensation" (lecture presented at the Nordic Workshop, Holte (DK) October 2005) p.12
[53] International Court of Environmental Arbitration and Conciliation, *Consultative Opinion on the Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops* (June 2005) p.31

2) under the provision of this Act or other provisions, may be placed on the market only if labelled with a reference to the genetic modification, or
3) cannot be placed on the market with a label that would have been permitted under the relevant legal provisions for the production method

The first of these provisions refers to a situation whereby a crop has become contaminated with a genetically modified organism (GMO) that has not yet been authorised for release on to the market, and as such cannot be sold. An example of this would be a field trial of a new GM crop causing contamination.

The second provision addresses situations where a product contains more than 0.9% GM material and has to be labelled as required by Article 12(2) Regulation 1829/2003/EC. This may have consequence of reduced sale price, and therefore a concomitant reduction in profit for the farmer.

The third issue relates to prohibiting a product being placed on the market labelled as "organic" under EC Regulation, or as "without genetic engineering" under the relevant German law.

Section 36a (2) provides that compliance with s.16b(2) and (3) (the GFP provisions) is considered to constitute measures that are "reasonably expected to afford" under s.906(2) BGB. As a result of this, significant impairment as a result of GM contamination can be prohibited where the responsible party has failed to comply with GFP.54 However, given that the exact legal requirements of GFP have yet to be determined it is not possible to abide by them

Nevertheless, for the purposes of this scenario, it is not necessary to know what the requirements are, simple to assume in the scenario that they have been adhered to.

Section 36a (3) states that an assessment of the customary situation (as required by s.906(2) BGB) will *not* take into account whether or not products are produced with or without GMOs. This has a two fold effect: while the transgenic farming cannot be prohibited on the basis that it is not customary practice, it also means that *organic* farming does constitute a

[54] International Court of Environmental Arbitration and Conciliation, *Consultative Opinion on the Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops* (June 2005) p.31

customary practice. Therefore an organic farmer may seek compensation where the customary use of his own land is intolerably impaired or independent of intolerability, under section 823 BGB the victim can claim compensation in case of negligence[55].

Therefore, while compliance with GFP may protect a party responsible for GM contamination from equitable prohibitionary measures under s.906(2) BGB, or fault based compensatory claims under s.823 BGB, it does *not* protect them from the requirement to pay compensation where neighbouring land is intolerably impaired, as specified by s.906(2) BGB.

Provision is made for instances where several individuals could be responsible for significant impairment, but it is not possible to determine whom has caused it (joint liability). In this situation, the individuals can be held jointly and severally liable under s.36a(4). However, this shall *not* apply where each of them has caused only part of the impairment, and it is possible to divide the compensation between the interfering parties under s.287 Code of Civil Procedure, whereby a judge may estimate the shares of causation.

- Under the German civil liability system, there is full fault based monetary compensation under s.823 BGB and, where GFP has not been complied with, strict liability based equitable claims under s.906(2) BGB. Additionally, where contamination is found to represent an intolerable impairment to neighbouring property, the responsible party is required to pay reasonable monetary compensation to the party suffering the loss, regardless of fault.

3.2.1.1 Comparison and Choice

It is clear from the brief overview outlined above that the two systems are very distinct in their approach to compensation for GM contamination. This will undoubtedly have a strong impact on a claimant's decision with regards to choice of jurisdiction.

With regards to cross-border contamination the Danish compensation scheme is may be viewed as being extremely limited, especially from the point of a foreign national. The Danish system does not specifically provide for damage that arises or occurs outside Denmark, or for the claims of a foreign national. Indeed, it has been noted that "no member state has yet

[55] International Court of Environmental Arbitration and Conciliation, *Consultative Opinion on the Liability of Public and Private Actors for Genetic Contamination of Non-GM Crops* (June 2005) p.31

proposed cross-border co-operation with neighbouring countries as a way of guaranteeing the effectiveness of co-existence measures in border areas".[56] It is difficult to envisage a situation whereby a compensation scheme, funded by a national tax, compensates for loss felt by an individual from *outside* that nation.

It appears likely that a foreign national, in our scenario a Germen farmer, will not have access to the compensation fund. Therefore, the advantage of not having to resort to the courts is lost to a German national seeking compensation for damages in Denmark and his only recourse will be to sue for damages under the Danish civil law

Under the Danish civil system, the burden of proof is on the German farmer to demonstrate that the Danish farmer was at fault and did not follow the required coexistence measures. A claim from a German farmer in cases involving several defendants growing the same GM crop, where may be impossible to identify which defendant had caused the damage is unlikely to succeed.

In the improbable event that the German farmer is given access to the Danish compensation fund there are restrictions in terms of the time of claim and what can actually be provided. This issue affects anyone who attempts to claim: one only has 14 days from when one *should* or did notice the damage. This can be considered to be fairly restrictive and it seems likely that there will be much debate over the interpretation over the term "when one should notice the damage". Moreover, the scheme can only provide *monetary* compensation, and even then it is restricted to the price *difference* between that obtained for a crop which must be labelled GM and that which may be obtained for a traditional or organically grown crop. The level of compensation will be determined by the Danish authorities (based on the Danish markets) and may not necessarily reflect the farmer's evaluation of the value of the crop (based on the German market).

However, as noted above, the payment of compensation from the fund does not necessarily translate into an inability to claim under Danish civil law, yet, the advantage of not having to

[56] European Commission "Commission Staff Working Document: Annex to the Communication from the Commission to the Council and the European Parliament, Report on the Implementation of National Measures on the Coexistence of Genetically Modified Crops with Conventional and Organic Farming" (COM(2006)104) p17

resort to the courts is lost to a German national seeking compensation for damages in Denmark.

The likelihood of success under the Danish civil system is lower than both the German civil system and the Danish compensation scheme: the Danish system requires demonstration of fault. Thus, in cases involving several defendants growing the same GM crop, it would be almost impossible to identify which defendant had caused the damage. As such, no fault could be demonstrated, and the claim would be turned down. This is in direct comparison to the compensation scheme and the German civil liability system, which in some cases does not require fault.

The German civil liability method also provides for equitable remedies, rather than simply monetary compensation. The Danish system allows only for monetary compensation.. However, could a German court reasonably expect a Danish farmer to apply *German* GFP regulations? The answer must be no. As a result, a German farmer could never realistically seek an injunction against a Danish farmer, as the Danish farmer would never have had the *opportunity* to abide by the regulations required to render him immune to such a claim.

Given these issues, decision as to the jurisdiction chosen is not clear cut, and will depend on the facts of the case; it is important to understand the positive and negative qualities of both the Danish and German systems in respect to the likely success of a claim in certain circumstances.

However, it *is* possible to give somewhat of a generalisation: it is, on the whole, more sensible (from the point of view of a successful claim) for a Danish individual to use the Danish system, as they will almost certainly get a degree of monetary compensation from the fund (unless he did something that contributed to the loss (inadvertent or deliberate) or his behaviour reduced his opportunities of making a recourse claim under s.11), and would *still* have the option of pursuing a civil claim against the farmer who caused the loss (providing fault could be demonstrated). This would not be the case where a Danish farmer sought not monetary compensation, but specific performance. In such a case, Germany would offer the most attractive jurisdiction.

In the case of a German farmer, the likely choice of forum is Germany itself. This is a result of the unlikelihood of a foreign national being able to claim under the Danish compensation scheme. As such, a German claimant in Denmark would be reduced to only using the Danish civil liability system, which offers not advantages over the German system, while at the same time actually presenting negative qualities, such as the fundamental requirement for fault to be demonstrated, and an inability to provide for specific performance.

3.2.1.2 Application to Scenario Facts

The background to all scenarios, as outlined above, covers a situation where all farmers are growing maize and they were planted, grown and harvested at the same time, with both farmers domiciled in their respective locations and contamination due to cross-pollination at above 0.9%.

Scenario 1 – German GM farmer(s), Danish conventional farmer.

In this scenario where the contaminating crops are grown in Germany and the contaminated crops are grown in Denmark there is nothing preventing the Danish owner of the contaminated crop from claiming under the Danish compensation scheme.

Under these facts, full price-differential compensation would most likely be provided by the fund: while there is no specific provision in the Danish legislation covering cross-border GM contamination issues, there is also nothing to state that the fund *cannot* pay out in the case of cross-border contamination. It is exceedingly unlikely that the fund would not pay out to a Danish farmer who has suffered loss due to foreign contamination where there is no specific provision preventing it from doing so.

If the German farmer has adhered to good farming practise and observed the relevant coexistence measures, then neither the Danish government nor the Danish farmer could peruse any action against the German farmer via the Danish courts as Danish civil law is a fault based system.

However, if it could be shown that the German farmer had not followed the relevant coexistence measures than the Danish government could seek to recoup the loss from the

fund by sueing the German farmer, by virtue of s.11 of the Danish Act on the growing etc. of Genetically Modified Crops. The Act provides that the Danish government is subrogated to any claims the farmer which suffered the loss may have against the farmer that caused the loss. Therefore, it is suggested that the Danish government would have the opportunity, under the provisions of the Brussels Convention and relevant case law (both outlined above) to make a decision on whether or not it would be the courts of Germany or Denmark that would entertain this claim. In this set of circumstances, there would be no reason to locate the proceedings in Germany as there is only one contaminating farmer, and as such there would be no problems with identification, simply the need to demonstrate fault.

Additionally, having been provided with compensation from the fund, the Danish farmer who suffered the loss remains entitled to pursue a claim for damages against the German farmer for losses in excess of those provided by the compensation fund. Here, again, given the provisions of the Brussels Convention, the claimant has the opportunity to choose between the Danish and the German courts; and again, in this scenario, there would be no reason for Germany to be chosen, as the identity of the contaminating farmer is clear, simple the requirement of demonstrating fault.

The Danish civil law system only provides for damages on the demonstration of fault. The Danish farmer may consider in situations where the German farmer did not follow coexistence measures and fault can be demonstrated to pursue a claim in Germany in order to take advantage of the equitable remedies available under s.906(2) BGB.

3.3 Multiple Defendants

Let it be supposed that all the facts of the original scenario remain the same but with one key difference: there is more than one neighbour to the claimant Danish farmer, all of whom grow the same type of GM maize. This would have a significant impact on the above scenario as it becomes effectively impossible to identify the farmer whose crops caused the contamination.

This would not immediately effect the compensation available to the Danish claimant: the compensation fund pays out regardless of fault, providing its other requirements are met. However, it would have a major effect on further claims. For example, given the requirement to demonstrate fault under the Danish civil liability system, it would be unlikely that the

Danish government, as a subrogated claimant, would seek to pursue its claims against a German farmer in the Danish courts, given the impossibility of a successful claim when unable to demonstrate fault.

Likewise, there would be no purpose in the Danish farmer seeking to extract excess damages from any of the German farmers in a Danish court for the same reason: it would be impossible. Thus, both the Danish government (as a subrogated claimant) and the claimant Danish farmer would logically choose to locate their respective claims against the German farmers in the German courts.

Effectively, for a Danish claimant, if there are several defendants and for some reason one cannot use the Danish compensation scheme; the logical choice would be to make a claim in Germany. If there are several defendants and one *can* use the compensation scheme, one would apply for compensation under the fund system, and then sue in Germany for excess damages.

Scenario 2 – Danish GM farmer(s), German conventional farmer.

In the scenario where it was a Danish GM farmer and a German conventional farmer, it would again be relatively simple to remedy. The level of contamination (above 0.9%) satisfies any of the three requirements specified under s.36a (1) to render the contamination a significant impairment. As such, having demonstrated this level of contamination, the strict liability nature of s.906(2) (in relation to the intolerability of the impairment) would automatically require compensation to be paid. If negligent\faulty behaviour can be demonstrated, general tort based liability under s.823, which also provides compensation, would also be an option. It is very unlikely that a German farmer would be successful in a request an injunction against a Danish farmer on the basis of a failure to abide by the regulations pertaining to GFP as laid down by s.16(b), as there is no requirement for a Danish farmer to adhere to these standards.

3.4 Multiple Defendants

In a situation where there is more than one neighbour to the claimant German farmer, all of whom grow the same type of GM maize. the situation for a German claimant is clear. Given

the Danish civil liability system's requirement for identification of the farmer causing the contamination, all actions would take place in the German courts.
Here the ability of the German system to act with strict liability *and* operate prohibitionary measures (rather than merely compensatory) would be a great advantage.

Scenario 3 – Danish organic farmer, German GM farmer(s).

So far, issues of where the claimant would *choose* to locate a claim have been addressed. However, there are some circumstances in which there is no choice. This can occur where the claimant is an organic farmer, or where a prior agreement has been made between the parties as to where jurisdiction will lie.

In terms of organic farming, the reasoning has already been touched upon. Article 16(1)(a) of the Brussels Convention requires that in "…proceedings which have as their object rights *in rem* in immovable property, the courts of the Contracting State in which the property is situated" shall have exclusive jurisdiction. Therefore, wherever the organic claimant's crops are located will be the appropriate forum for the claim.

In the case of a Danish organic farmer, a claim to the compensation fund would, if all other criteria are met, result in a pay out totalling the price differential between a GM and organic crop, and would cover the duration of the organic recertification of the land. If the party responsible for the contamination is identifiable, the organic claimant could continue his claim for any damages in excess of the compensation paid. Evidentially, given the exclusive jurisdiction of the Danish courts, there would be no opportunity to base the claim in Germany, and as such where there are multiple defendants this course of action would not be possible.

Scenario 4 – German organic farmer, Danish GM farmer(s).

A claim involving a German organic farmer suffering GM contamination from a Danish farmer (or farmers) would be remedied in exactly the same way as in the "conventional farmer" scenario, given that in the conventional scenario there is no choice/benefit in basing the claim in Denmark, the issues are effectively identical.

4 Conclusion

This case study has attempted to provide some insight into how an incident of cross-border GM contamination would be resolved between Denmark and Germany, using a variety of different factual variations. However, it must be remembered that there have, as yet, been no such claims made. It is hoped that, should these claims be made, this paper will have provided a somewhat accurate forecast of the methods that would be used, and the issues that may be raised. One may only wait with interest the time when these legal problems will be put to the test.