

Bernhard A. Koch

## **Economic Damage from GMO admixture in non-GM products:**

### **Liability and Compensation Schemes**

My task today is to alert you of certain problems of co-existence which arise after GMOs have been released, and despite all measures that have been taken to minimise admixture.

The classic case is the one of two neighbouring farmers: One has decided to stick to conventional crops, the other has opted for GM crops. Both (hopefully) derive income from their activity.

However, without any wrongdoing of either side, GM seeds are blown from the right field to the left, so that the production there can no longer be called GM-free, which most likely will cause economic loss to that farmer, for example income, due to a lower market price of the (now modified) crop or difficulties in selling it.

Who shall bear that loss?

In the beginning, it is of course the farmer on the left, but the question is, shall we leave him with that loss, or will he be able to recover at least part of it from someone else. The first alternative does not seem to be an option in the first place – it simply sounds brutal and contrary to that farmer's free choice to grow conventional crops.

On the other hand, there are many other scenarios imaginable where the same farmer suffers the same or even more loss, for example through natural catastrophes. The forces of the wind are to blame for both – does it make a difference here?

Seen from the perspective of society at large, the loss of the individual will not be lost to the economy as a whole: That farmer's customers will simply go to another farmer who can still guarantee to produce non-GM products, even though some may be deterred from further consumption at all.

Still, it would leave us with a distinct sense of unease if we left the poor farmer on the left with his loss entirely, so let's see what other solutions we may have for him.

Any loss allocation scheme will have to fulfil certain minimum standards. Some of them are listed on this general checklist:

- (1) The ultimate goal of any regime is a fair distribution of risk – advantages and disadvantages of producer behaviour have to be taken into account as well as other aspects of a more general nature.
- (2) No matter what kind of regime we come up with, it has to be easy to handle. The more complicated the requirements for finding a solution, the less likely the regime will survive in practice.
- (3) Access to the scheme is of paramount importance. Claims should not be denied (or discouraged) merely because it is too complicated to apply. The procedure to obtain compensation must be apt to handle the volume of potential claims in the best possible way (but at the same time allow for a thorough analysis of the matter) – the decision should be time-efficient, but not a quick shot.
- (4) A connected matter is costs of the scheme: We are not talking of the amounts actually paid out in compensation, but administrative costs – attorneys, judges, civil servants in the administration handling claims and the like.

(5) Even if a scheme theoretically allows a claim for compensation, the victim ultimately may not collect money on that basis, for example because the defendant in a tort suit is bankrupt, or if a compensation fund is empty, so that would also have to be taken care of.

The classic way to award compensation for such a detriment is tort law, of course. Here, the farmer who suffered the loss sues the neighbour from where the GM crops came from. If, but only if the requirements for awarding compensation are met, that defendant will have to indemnify the claimant.

There are several difficulties in the tort law arena, however, particularly for the kind of problems we are looking at here.

The first problem is already the definition of loss: Is the detriment that the farmer has suffered really compensable? A legal system may decide to award damages only if GM crops were actually mixed with conventional ones, but not for the mere fear thereof: The farmer whose suspicious customers no longer believe his GM-free label despite the fact that it is indeed true also suffers an economic loss. Is mere fear of admixture also recognized as a basis for a tort claim?

The next set of problems concerns the ultimate defendants – who shall we go after? The obvious first choice will be the neighbouring farmer who cultivates GM crops, but also others in the vicinity who do the same. Behind them in the chain of production are the seed producers, or even the authority that regulates (and authorizes) the release of GMOs.

Then there's causation – always a tricky question in tort law. How can the claimant prove that it was seeds from his neighbour and not from somewhere else that contaminated his own crops? Maybe his own allegedly conventional seeds were no longer pure when he bought them. Who carries the burden of proof, and what percentage of probability is needed to succeed before the courts?

Even if it is clearly established that the admixture was triggered by crops from the neighbouring field, do we really see enough reason to hold that farmer liable simply for the fact that he is in charge of the cause? Or do we require some sort of wrongdoing on his side, for example failure to observe mandatory segregation measures. The core of this problem concerns the classic choice between fault and no-fault liability.

The type and extent of compensation is probably less controversial once we have reached that question, but there may be limits to the amounts available. Also, it is important to know whether the system allows for injunctive relief, i.e. a tool to ban GM production in advance simply for the fear of admixture that may cause loss in the future, particularly if it has happened before.

All these difficult questions arise in any given legal system. The responses thereto vary, however, from one country to another, sometimes even substantially, so the non-GMO farmer will collect compensation in one country but not the other, which is particularly troublesome in a cross-border setting. Even though we are one Union, our legal systems are certainly not uniform when it comes to tort law.

So far, the Commission has signalled that subsidiarity is the key, so that each national system shall decide how to handle such claims. Is national diversity really desirable, or do we have to strive for harmonisation in this field? After all, it seems that the different solutions found in the various member states do have an impact on the internal market: If a producer does not have to worry about liability claims in one country but certainly in the other, I see a clear choice here where he will turn to. The problem cannot be addressed, however, before

resolving the fundamental question whether harmonisation is feasible at all. If it were impossible, there is no point in deciding whether we want it or not.

So far, European law has influenced the existing tort laws only in specific parts, the most prominent being product liability, and even after 20 years of that regime, it is still not fully accepted in the practice of all member states, who continue to apply alternative regimes of their own on the side. However, another attempt to harmonise liability laws with respect to only a very peculiar set of problems may cause even more imbalances within one legal system, whose answers to the many problem areas listed before are based upon their individual approach to tort law as a whole. Just think of different ways of assessing the standard of care or the like. So harmonising just liability for GMOs may risk an admixture of tort law regimes even within one single member state.

It therefore seems more desirable to at least consider the various tort law systems as such before interfering with them with respect to yet another comparatively small part thereof. Another, certainly much bolder plan would be to harmonise tort law as a whole. One roadmap for that has been presented last year by the European Group on Tort Law, whose member I am proud to be. But that is certainly a long way to go, even if one should decide to embark on that path.

Another (though certainly closely connected) way to obtain compensation is via insurance. The major difference here is that the addressee of the claim at least in theory can draw from much larger funds than the individual farmer.

The most important insurance scheme in this setting is of course third-party insurance, in particular liability insurance, so it is triggered by the tort law that we have just addressed. Insurance in that sense serves as a cushion to the shortcomings of tort law proper, inasmuch as it helps to simplify and to assure access to payments.

As with all deep pockets, they are not worth going after if they are empty. So who fills this pot?

The obvious insured are the farmers and other producers who have opted to cultivate GM crops. By taking out insurance, they can form a risk pool which reduces at least in part the likelihood to get sued individually. What is sometimes overseen is the fact that is actually the ultimate consumer who pays the insurance premiums: The farmer will inevitably pass on these costs to his customers.

Another group of insurance clients are the seed producers, who are simply one step behind in the production chain. Depending on the legal system, they will also have a more or less stronger interest in providing for cover against the risk of being sued (be it by way of recourse). The practical importance of such a risk pool is bolstered, of course, by statutory rules requiring insurance, as some countries already do. However, in other countries, insurance is not even available (yet) on the market for the kind of risks that we are talking about.

An alternative type of insurance would be first-party insurance: Potential victims thereby have to take out insurance themselves in advance. Probably all farmers already have first-party policies, though covering different risks, for example natural disasters or the like. It is of course a highly sensitive and probably problematic issue to even mention this as an alternative route to ensure that losses caused by admixture are compensated. The arguments in favour of such a regime are similar to the ones mentioned at the beginning when we considered to leave the loss with the direct victim.

However, first-party insurance is of particular importance at least in all those cases where tort law would not provide a path to obtain compensation, for example for difficulties of proving

causation, or because the respective national system has decided to deny liability if the cultivation of GM crops was done according to the standards of segregation in force at the time. The definition of such standards is therefore of paramount importance also with respect to liability for possible failures of the regime.

Another option contemplated by at least some jurisdictions (and even introduced by a few) are compensation funds. While the pot is usually smaller, such funds have the big advantage that they can be tailor-made to the particular problems it intends to address. Furthermore, such funds tend to have procedural advantages in comparison to other regimes: As it is designed specifically for a peculiar set of problems, formalities tend to be easier to fulfil for the claimants, and payments are typically faster than under other schemes.

Also, the range of payors who contribute to the fund is typically broader than in the classic insurance scheme.

Very often it will be the state who steps in and pays at least some moneys into the pot, in addition to other stakeholders.

However, the amount of each stakeholder's contribution is not always easy to determine: While in the insurance setting, it is the decision (and responsibility) of the insurer to determine how high the premiums must be in order to maintain a functioning system, payments into compensation funds are not always calculated according to risk assessment as defined by actuarial mathematics. Particularly the state contributions tend to follow political and/or budgetary constraints.

I have tried to present to you at least the most important options for a legal system to react to economic losses caused by the admixture of GM crops with conventional or organic crops. For the time being, and within the extreme time constraints that I was facing, I could only give you a brief overview.

More detailed information will be given by the results of a study that the Research Unit for European Tort Law of the Austrian Academy of Sciences, whose vice-director I am, has just started by order of the Commission. We are pursuing this study jointly with the European Centre for Tort and Insurance Law, also domiciled here in Vienna, by the way. Our study will include reports from every single EU member state, furthermore an economic analysis as well as a survey on insurance aspects of the matter.

I would like to thank you for attention.