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## European Food Law Update

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# EUROPEAN UNION FOOD LAW UPDATE

*Emilie H. Leibovitch* \*

## I. INTRODUCTION

This EU Food Law Update will focus on the developments that occurred since October 2010 in the areas of genetically modified organisms, novel foods, contaminants, food quality, and labeling.

## II. GENETICALLY MODIFIED ORGANISMS

Following the Commission Proposal to give Member States the possibility of restricting or prohibiting the cultivation of genetically modified organisms in their territory,<sup>1</sup> the European Parliament Committee on the Environment, Public Health and Food Safety (ENVI Committee) has been discussing the issue. A Rapporteur wrote a Draft Report on the Proposal.<sup>2</sup> On the basis of this document, the ENVI Committee adopted its final Report in April 2011, and the entire Parliament is expected to vote on it in June 2011.<sup>3</sup>

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1. Proposal for a Regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory, COM (2010) 380 final (July 13, 2010), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0375:FIN:EN:PDF>.

2. *Draft Report of the Committee on the Environment, Public Health and Food Safety on the proposal for a regulation of the European Parliament and of the Council amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of GMOs in their territory*, 2010/0208(COD) (Jan. 27, 2011), *available at* <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COM-PARL+PE-456.911+01+DOC+PDF+V0//EN&language=EN>.

3. *EU Parliament Committee Votes for GMO Cultivation Bans on Environmental Grounds*, INT'L INST. FOR SUSTAINABLE DEV. (Apr. 12, 2011), <http://biodiversity-l.iisd.org/news/eu-parliament-committee-votes-for-gmo-cultivation-bans-on-environmental-grounds/>.

According to Directive 2001/18/EC, genetically modified organisms can be placed on the market if a specific environmental risk assessment has been carried out according to the principles set out in Annex II of this Directive, and based on information specified in Annex III.<sup>4</sup> In its Draft Report, MEP Corinne Lepage indicates that in addition to this, Member States should be able to take into consideration “other grounds that may include, inter alia, changes in agricultural practices, land use, town and country planning, socio-economic impacts, or other legitimate factors.”<sup>5</sup> In addition, her Draft Report points out the distrust many Europeans have toward genetically modified organisms.<sup>6</sup> In the meantime, discussions on this subject are also ongoing within the Council. The Council is set to discuss possible justifications that would permit Member States to restrict the cultivation of genetically modified organisms in their territory. There are some doubts on whether such a piece of legislation is in conformity with the internal market rules and the WTO agreements.<sup>7</sup> Back in 2008, the Council issued conclusions on genetically modified organisms, which asked for the environmental risk assessment in the authorization process to be strengthened, for a European Commission report analyzing the socioeconomic benefits and risks of placing genetically modified organisms on the market to be published by June 2010, and for labeling thresholds to be adopted by the European Commission to warn of the adventitious presence of authorized genetically modified organisms in conventional seeds.<sup>8</sup> Some Member States believe the full implementation of these conclusions would bring about more fruitful discussions.<sup>9</sup>

In addition, in October 2010 the European Commission issued a recommendation for tolerable magnitudes of unapproved genetically modified organisms in agricultural imports.<sup>10</sup> It recommends

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4. Council Directive 2001/18/EC, 2001 O.J. (L 106) 1 (EC).

5. *Draft Report*, *supra* note 2, at 13.

6. *Id.* at 15.

7. *EU Commission's Proposed GM National Bans May Be Legally Invalid—EU Council Legal Service*, GM WATCH (Nov. 12, 2010), <http://gmwatch.org/latest-listing/1-news-items/12658>.

8. Council Conclusions, Genetically Modified Organisms, 16882/08 (Dec. 5, 2008), *available at* <http://register.consilium.europa.eu/pdf/en/08/st16/st16882.en08.pdf>.

9. Press Release, Europa, Preparation Environment Council, 14 March 2011 (Mar. 11, 2011), *available at* <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/11/158&type=html>.

10. *Biotechnology: EU Commission for 0.1 per cent tolerance in feed imports*, GMO COMPASS (Oct. 29, 2010), [http://www.gmocompass.org/eng/news/544.biotechnology\\_eu\\_commission\\_01\\_per\\_cent\\_tolerance\\_feed.html](http://www.gmocompass.org/eng/news/544.biotechnology_eu_commission_01_per_cent_tolerance_feed.html).

that for feed imports, unintentional impurities be permitted up to 0.1%.<sup>11</sup> This shifts from the “zero tolerance” policy currently practiced in the EU toward unapproved genetically modified organisms.<sup>12</sup> This recommendation was adopted by the Standing Committee on the Food Chain and Animal Health (technical group composed of Member States and chaired by the European Commission); it is now going through the “comitology with scrutiny” procedure and is being discussed within the European Parliament.<sup>13</sup>

### III. NOVEL FOODS

Given the lack of agreement between the European Parliament and the Council on the Commission Proposal for a Regulation on Novel Foods, the text officially went to Third Reading—also known as conciliation procedure—in December 2010.<sup>14</sup> A lot of the disagreement relates to the issues of cloning and nanotechnology.<sup>15</sup> The conciliation procedure is the last attempt to adopt the proposal into law.<sup>16</sup> The proposal will be discussed at informal meetings—called “trialogues”—between the European Parliament, the European Commission, and the Council Presidency, to try to negotiate a compromise on the proposal.<sup>17</sup> Then, a Conciliation Committee, composed of representatives from Member States and the European Parliament, will meet to try to draft a joint text based on the negotiations in the triologue meetings.<sup>18</sup> The conciliation procedure is expected to end by the end of March 2011.<sup>19</sup> After that date, the

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11. *Id.*

12. *Id.*

13. *EU Considers Changing “Zero Tolerance” GM Policy For Animal Feed*, CHECK BIOTECH (Mar. 1, 2011), [http://greenbio.checkbiotech.org/news/eu\\_considers\\_changing\\_zero\\_tolerance\\_gm\\_policy\\_animal\\_feed](http://greenbio.checkbiotech.org/news/eu_considers_changing_zero_tolerance_gm_policy_animal_feed).

14. Press Release, Council of the European Union, Employment, Social Policy, Health and Consumer Affairs (Dec. 6-7, 2010), [http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lssa/118254.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lssa/118254.pdf).

15. Jess Halliday, *No Novel Food Agreement Would Show No-one Cares About Innovation*, CONSULTANT, FOOD PRODUCTION DAILY (Mar. 21, 2011), <http://www.foodproductiondaily.com/Quality-Safety/No-novel-food-agreement-would-show-no-one-cares-about-innovation-consultant>.

16. EUROPEAN PARLIAMENT, CODECISION AND CONCILIATION: A GUIDE TO HOW THE PARLIAMENT CO-LEGISLATES UNDER THE TREATY OF LISBON 1, 15 (2009), available at [http://www.europarl.europa.eu/code/information/guide\\_en.pdf](http://www.europarl.europa.eu/code/information/guide_en.pdf).

17. *European Commission Codecision*, EUROPEAN COMMISSION, [http://ec.europa.eu/codecision/stepbystep/text/index5\\_en.htm](http://ec.europa.eu/codecision/stepbystep/text/index5_en.htm) (last visited June 3, 2011).

18. *Id.*

19. Halliday, *supra* note 15.

European Parliament will have to vote on the joint text, if such a text manages to be drafted and agreed on.<sup>20</sup> If the authorities cannot reach such an agreement, the proposal will not be adopted and the legislative procedure will end.<sup>21</sup>

#### IV. CONTAMINANTS

In December 2010, German authorities discovered that a batch of fatty acids that was meant to be used for technical purposes was mixed with fat designed for the production of feed.<sup>22</sup> Thanks to the traceability procedures in place, authorities were able to find that the batch of fatty acids was produced in a German biodiesel company and was delivered to a German feed fat producing company.<sup>23</sup> The batch in question contained levels of dioxin that were higher than those allowed under EU law.<sup>24</sup> Later, additional batches were found to be contaminated.<sup>25</sup> While the feed fat that was considered potentially contaminated was delivered to several compound feed manufacturers in Germany, no deliveries were made outside Germany.<sup>26</sup> As for the feed produced out of the potentially contaminated fat, it had been delivered in Germany to laying-hen, fattening-poultry (broilers and turkey), pig, dairy cattle, bovine, rabbit, and goose farms, and some crossed borders to France and Denmark.<sup>27</sup> Because the levels in the fat transported to Denmark were higher than the EU limits, the animals fed with the contaminated fat did not enter the food chain.<sup>28</sup> For the fat that entered France, the di-

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20. *European Commission Codecision*, *supra* note 17.

21. CODECISION AND CONCILIATION, *supra* note 16. UPDATE: in March 2011, the discussions on the Commission Proposal for a Regulation on Novel Foods officially failed as no agreement could be reached in the conciliation procedure. The proposal was thus not passed. This means that the status quo remains for now, until the Commission brings forward a new proposal in the future.

22. *Feed Contamination—Dioxin in Germany*, EUROPA.EU, [http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin\\_germany\\_en.htm](http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin_germany_en.htm) (last visited June 4, 2011).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Feed Contamination—Dioxin in Germany*, EUROPA.EU, [http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin\\_germany\\_en.htm](http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin_germany_en.htm) (last visited June 4, 2011).

28. *Id.*

oxin levels were reportedly within the thresholds allowed by the EU.<sup>29</sup>

Due to this event, a number of farms were blocked (pigs and laying-hen farms) but the meat of several potentially contaminated pigs coming from a blocked farm was nevertheless sent to Poland and the Czech Republic before the farm closing.<sup>30</sup> While the meat was not transported further, the potentially contaminated meat sent to the Czech Republic turned out to be in compliance with the EU thresholds, but the meat sent to Poland was consumed before analyses could be made.<sup>31</sup>

Member States are now discussing needs for tighter controls and increased transparency to ensure that this does not happen again.<sup>32</sup> This incident may have implications for other feed materials and may compromise private-regulation initiatives. In the meantime, investigations on the causes of this crisis are ongoing.<sup>33</sup>

## V. FOOD QUALITY

In December 2010, the European Commission released two proposals that form the so-called “Quality Package.”<sup>34</sup> This Quality Package includes a proposal for a Regulation on agricultural product quality schemes<sup>35</sup> and a proposal to modify Regulation (EC) No 1234/2007 concerning marketing standards for agricultural products.<sup>36</sup> It also contains guidelines of best practices on voluntary-certification schemes and on the labeling of products using protected designations of origin (PDOs) or protected geographical indi-

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29. *Id.*

30. EUROPEAN COMM’N, DIOXIN CONTAMINATION INCIDENT IN GERMANY CLOSING INFORMATION NOTE, available at [http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin\\_germany\\_information\\_note\\_en.pdf](http://ec.europa.eu/food/food/chemicalsafety/contaminants/dioxin_germany_information_note_en.pdf).

31. *Id.*

32. *Germany May Tighten Controls After Dioxin Affair*, MSN NEWS (Jan. 10, 2011), <http://news.uk.msn.com/world/articles.aspx?cp-documentid=155808127>.

33. DIOXIN CONATMINATION INCIDENT, *supra* note 31.

34. *Quality Package 2010*, EUROPA.EU, [http://ec.europa.eu/agriculture/quality/policy/quality-package-2010/index\\_en.htm](http://ec.europa.eu/agriculture/quality/policy/quality-package-2010/index_en.htm) (last visited June 4, 2011).

35. *Commission Proposal for a Regulation of the European Parliament and of the Council on Agricultural Product Quality Schemes*, COM (2010) 733 final (Dec. 10, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0733:FIN:en:PDF>.

36. *Commission Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards marketing standards*, COM (2010) 738 final (Dec. 10, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0738:FIN:en:PDF>.

cations (PGIs) as ingredients.<sup>37</sup> This Package has now entered the co-decision procedure and is thus being discussed at European Parliament level and at Council level.<sup>38</sup>

The proposal on marketing standards aims at extending the minimum requirement of “sound, fair and marketable” that already exists in market-management measures, to products that are not covered by specific marketing standards.<sup>39</sup> In addition, according to this text, the Commission would be able to adopt marketing standards by sector or by product for products that are listed in Annex I of Reg. 1234/2007.<sup>40</sup> Such standards could include a variety of requirements, including one on place of farming and/or origin labeling.<sup>41</sup> The issue of origin labeling is already discussed in the context of the Commission Proposal for a Regulation on the provision of food information to consumers, and thus authorities will have to pay careful attention to the direction the debates take on both proposals to ensure consistency between the two texts.

## VI. LABELING

On February 11, 2011, the Council released its common position on the Commission Proposal for a Regulation on the provision of food information to consumers.<sup>42</sup> The Council took a different position from the European Parliament on several issues.<sup>43</sup> Some of the most controversial points relate to nutrition labeling and country-of-origin labeling, and on the authority Member States should or should not have in setting standards concerning food labeling.<sup>44</sup> The

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37. Guidelines on the Labelling of Foodstuffs Using Protected Designations of Origin (PDOs) or Protected Geographical Indications (PGIs) as Ingredients, 2010/C 341/03, 2010 O.J. (C 341) 3.

38. *Quality Package 2010*, *supra* note 35.

39. *Commission Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1234/2007 as regards marketing standards*, COM (2010) 738 final (Dec. 10, 2010), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0738:FIN:en:PDF>.

40. *Id.* at 17.

41. *Id.* at 19.

42. Position of the Council at First Reading With a View to the Adoption of a Regulation on the Provision of Food Information to Consumers, 17602/10 (Feb. 11, 2011), available at <http://register.consilium.europa.eu/pdf/en/10/st17/st17602.en10.pdf>.

43. *See id.*; See European Parliament Press Release, Food labeling: Environment Committee sets out clearer rules, Apr. 19, 2011, available at <http://www.europarl.europa.eu/en/pressroom/content/20110418IPR18101/html/Food-labelling-Environment-Committee-sets-out-clearer-rules>.

44. *Id.*

piece of legislation also implicitly addresses the issue of self-regulation by discussing how far private regulation and public regulation can coexist on issues of public-health concerns.<sup>45</sup> Following this Council common position, the dossier has entered the Second Reading stage.<sup>46</sup> Thus, the European Parliament Environment, Public Health, and Food Safety Committee (the ENVI Committee), which has been the committee in charge of this topic from the beginning, must now agree on amendments to the Council's common position.<sup>47</sup> The views vary a lot, and it is expected that compromises will have to be made to avoid having this piece of legislation go through the conciliation procedure.<sup>48</sup>

The Council and the Parliament disagree on the content of the nutrition declaration on food products.<sup>49</sup> Disagreement over the actual nutrients to be declared, whether the declaration should be mandatory or voluntary, and whether the declaration should be indicated on the front of the pack or on the back of the pack are some of many points where views diverge.<sup>50</sup> In addition, the Parliament and the Council disagree on whether labeling of the country of origin should be made mandatory for a number of products.<sup>51</sup> The Parliament wants to make country of origin labeling mandatory on a variety of products, and is against having the Commission carry out a prior impact assessment to determine whether such measures are feasible on a case-by-case basis.<sup>52</sup> The Council favors voluntary country-of-origin labeling unless failure to indicate the origin might mislead consumers (this would not apply to meat, for which indication of origin would be mandatory).<sup>53</sup> In addition, the Council indicated that if the country of origin is voluntarily given on a food but the

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45. Position of the Council at First Reading With a View to the Adoption of a Regulation on the Provision of Food Information to Consumers, 17602/10 (Feb. 11, 2011), available at <http://register.consilium.europa.eu/pdf/en/10/st17/st17602.en10.pdf>.

46. Miguel Fernandes da Silva, *Council Reaches Political Agreement on Food Information to Consumers Proposal, Leading to Difficult Negotiations with the EP at Second Reading*, EAS EUROPE (Oct. 21, 2010), [http://www.eas.eu/News\\_Item/635](http://www.eas.eu/News_Item/635).

47. *Id.*

48. *Id.*

49. *See supra* at note 44.

50. *Id.*

51. *Id.*

52. *Id.*; *See also* CIAA Press Release, Food manufacturers reiterate call for meaningful information and a 'common sense' approach for consumers following key vote on food information, Apr. 19, 2011, available at [http://www.ciaa.be/asp/documents/detailed\\_doc.asp?doc\\_id=945](http://www.ciaa.be/asp/documents/detailed_doc.asp?doc_id=945).

53. da Silva, *supra* note 46.

food's primary ingredient (an ingredient that represents more than 50% of that food) has a different origin, then the food should either indicate the country of origin of the primary ingredient, or bear the mention that the primary ingredient is from a different origin.<sup>54</sup>

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54. *Id.*