

Paratowyd y ddogfen hon gan gyfreithwyr Cynulliad Cenedlaethol Cymru er mwyn rhoi gwybodaeth a chyngor i Aelodau Cynulliad a'u cynorthwyywyr ynghylch materion dan ystyriaeth gan y Cynulliad a'i bwyllgorau ac nid at unrhyw ddiben arall. Gwnaed pob ymdrech i sicrhau fod yr wybodaeth a'r cyngor a gynhwysir ynddi yn gywir, ond ni dderbynir cyfrifoldeb am unrhyw ddibyniaeth a roddir arnynt gan drydydd partion.

This document has been prepared by National Assembly for Wales lawyers in order to provide information and advice to Assembly Members and their staff in relation to matters under consideration by the Assembly and its committees and for no other purpose. Every effort has been made to ensure that the information and advice contained in it are accurate, but no responsibility is accepted for any reliance placed on them by third parties

Constitutional and Legislative Affairs Committee

PROPOSAL FOR A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL AMENDING REGULATION (EC) NO 1829/2003 AS REGARDS THE POSSIBILITY FOR THE MEMBER STATES TO RESTRICT OF PROHIBIT THE USE OF GENETICALLY MODIFIED FOOD AND FEED ON THEIR TERRITORY

Legal Advice Note – Subsidiarity and Proportionality

Legal Context

1. The principles of subsidiarity and proportionality are enshrined in Article 5 of the Treaty on European Union –

Article 5

(ex Article 5 TEC)

1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.

2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.

3. Under the **principle of subsidiarity**, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States,

either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.

The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the **principle of proportionality**, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.

The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. EN C 83/18 Official Journal of the European Union.”

2. Its application is governed by the Protocol on the Application of the Principles of Subsidiarity and Proportionality, the relevant part of which for our purpose is the first paragraph of Article 6 –

“Any national Parliament or any chamber of a national Parliament may, within eight weeks from the date of transmission of a draft legislative act, in the official languages of the Union, send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion stating why it considers that the draft in question does not comply with the principle of subsidiarity. It will be for each national Parliament or each chamber of a national Parliament to consult, where appropriate, regional parliaments with legislative powers.”*[our emphasis]*

Commission Proposals

3. On the 22nd April 2015, the Commission published its proposal for a new Directive on the use of genetically modified food and feed. This proposal arose from the failure of the Council of Ministers to achieve the necessary qualified majority in favour or against proposals on the subject, leaving decisions to be taken by the European Commission.

4. The Commission's summary of its proposal is annexed at the end of this note. The first paragraph reads as follows –

“The Commission proposal amends Regulation (EC) No 1829/2003, under the ordinary legislative procedure, to introduce new provisions allowing Member States to restrict or prohibit the use of GMOs and GM food and feed covered by the GMO legal framework, in part or all of their territory, in complement to the possibilities already offered to Member States with respect to GMOs for cultivation by Directive (EU) 2015/412.” [our emphasis]

5. An Explanatory Memorandum has been prepared by the UK Government for the Parliamentary Committees on European issues. In its consideration of subsidiarity, the Memorandum stated as follows–

“MINISTERIAL RESPONSIBILITY

7. Responsibility lies with the Secretary of State for Environment, Food and Rural Affairs. Whilst the Food Standards Agency (FSA) is the UK competent authority for GM food and feed, including the negotiation and operation of the EU decision-making process under Regulation (EC) No 1829/2003, the Defra Secretary of State is the lead Minister for GM issues. In practice, the FSA and Defra are working together closely to determine and take forward the UK Government's position on this proposal.

INTEREST OF THE DEVOLVED ADMINISTRATIONS (DAs)

8. The FSA and Defra are currently discussing with the DAs what implications the proposal has for devolved decision making in the UK. The DAs have been consulted in the preparation of this Explanatory Memorandum.” ...

“SUBSIDIARITY

11. In its subsidiarity assessment for the proposal (section 4.3.1 of COM(2015) 177 final), the Commission notes that:

the authorisation of GM food and feed products is currently subject to a fully harmonised process, the general objective of which is to ensure a high level of safety throughout the EU;

under the current EU regime, Member States have limited scope to take measures on GM food and feed on the basis of non-safety considerations;

the proposal would give Member States a new discretion to adopt measures on GM food and feed for reasons unrelated to safety, provided they are in accordance with EU law. This is on the assumption that national or local decision-making is the most appropriate approach in this context.

12. The Government concurs with the Commission's assessment that decisions on the marketing and use of GM food and feed products are currently an issue of EU competence, and that the proposal would introduce a new element of subsidiarity by giving Member States the discretion to ban or restrict the use of EU-approved GM products on non-safety grounds. “

6. The proposal would clearly permit a decision to be taken to restrict or prohibit the use of genetically modified food or feed in all or part of a Member State. The UK Government's Explanatory Memorandum gives no indication that the devolved administrations will be able to take their own decisions in relation to their territories. Whilst the Commission proposal appears to comply with the principle of subsidiarity, it is important to establish how that subsidiarity would operate within the United Kingdom.

7. However, the Thüringen (Germany) State Parliament has already raised concerns under the subsidiarity process which it has summarised in English as follows–

“Bearing in mind the very strict legal requirements set out by the Commission in its proposal, it is highly questionable whether it is actually possible for a Member State to adopt opt-out measures in compliance with EU-law, especially with regards to the international obligations of the Union. Questionable is also to what extent the involvement of all 28 EU states in the mandatory notification and control procedure contributes to fulfil the intended objectives.”

8. The Committee is invited to consider whether it wishes to invite the Welsh Government to explain –

- whether it expects to take its own decision for Wales under the proposed Regulation and what discussions on that issue have taken place with the UK Government;
- to what extent, if at all, it agrees with the concern expressed by Thuringen.

Legal Services

National Assembly for Wales

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ANNEX – Extract from the Commission proposal

“4.1. Summary of the proposal

The Commission proposal amends Regulation (EC) No 1829/2003, under the ordinary legislative procedure, to introduce new provisions allowing Member States to restrict or prohibit the use of GMOs and GM food and feed covered by the GMO legal framework, in part or all of their territory, in complement to the possibilities already offered to Member States with respect to GMOs for cultivation by Directive (EU) 2015/412.

The additional powers granted to Member States under this proposal will only concern the possibility to adopt measures in accordance with the Treaty to restrict or prohibit the use of GMOs and GM food and feed on their territory after these products have been authorised. It will thus not affect the procedural and substantial conditions of the authorisation of GMOs and GM food and feed under Regulation (EC) No 1829/2003, which will remain valid for the whole territory of the Union.

The measures adopted by Member States need to be compatible with the internal market, and in particular Article 34 TFEU which prohibits measures of equivalent effects to quantitative restrictions to the free movement of goods.

That is why the Member States making use of this proposal will need to justify the measures taken based on grounds to be in accordance with Article 36 TFEU and the notion of overriding reasons of public interest as developed by the case-law of the Court of justice. In addition, the measures envisaged will need to be reasoned and to be compatible with the principles of proportionality and non-discrimination between national and non-national products. Finally these measures will need to comply with the international obligations of the Union.

It will be up to each Member State wanting to make use of this "opt-out" to justify the restriction or prohibition on a case-by-case basis, taking into account the GMO in question, the type of measure envisaged, and the specific circumstances at national or regional level that justify such an opt-out.

As for Directive (EU) 2015/412, Member States will not be allowed to use justifications linked to the assessment of risks to health or to the environment

which are comprehensively addressed in the authorisation decision and by the procedures already available in Regulation (EC) No 1829/2003, to address new risks (e.g. “emergency measures” under Article 34 or “supervision” under Articles 9 and 21).

The new possibility offered by the proposal does not cover the placing on the market and use of products not labelled as genetically modified, in accordance with labelling thresholds set under the GMO legal framework (e.g. under Articles 12 and 24 of Regulation (EC) No 1829/2003 food and feed containing an adventitious or technically unavoidable presence of GM material up to 0,9% by ingredient are not labelled).

The Member States which will restrict or prohibit the use of GMOs and GM food and feed already on the market will also have to preserve the rights of the operators, by providing them a reasonable period of time to allow the phasing out of the products concerned.”