

# GMO-Regulation (EC) No. 1829/2003 and Honey: How to Proceed

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*For many years honey and the requirements of Regulation (EC) No. 1829/2003 on genetically modified food and feed were different worlds. This has ended with the judgment of the European Court of Justice (ECJ) dated 6 September 2011 in the "Bablock"-case C-442/09<sup>1</sup>. The ECJ held that pollen from GM crops which is detected in honey results in the application of Art. 3 para. 1 lit. c) of Regulation (EC) No. 1829/2003 and thus pulls the affected honey into the scope of the strict GMO-requirements of the Regulation, including mandatory authorization and labelling provisions. The ruling has potentially severe consequences for the marketing of honey in the EU. Thus, at the moment, one of the main legal and economic questions in regard to the commercial sale of honey is: How to proceed?*

## I. Introduction

"Hard cases make bad law"<sup>2</sup>, this legal maxim comes to mind after analyzing the ECJ's honey judgment in the "Bablock"-case C-442/09. In the relevant proceedings, the ECJ was told the story of the small beekeeper who cannot sell his or her honey because the beehive was kept in the backyard of the commercial cultivation of GM crops planted by a giant multinational company causing coincidental entries of pollen from GM crops in the honey.

After the judgment, it will be possible to award damages to the claimants. However, this was not the main motivation for the court proceedings. It is obvious that the claimants – all amateur beekeepers who located their beehives next to a cultivation of MON810-maize – wanted legal policy to be written on the topic of GMOs in food. And exactly that is what the ECJ's "Grand Chamber" did. While the proceedings in the honey case presented a good opportunity to establish the Court's political view on GMO-legislation, the legal obstacles were the wording, the systematic context and the original spirit and purpose of Regulation (EC) No. 1829/2003 – all of which pointed in the direction established so far that honey was outside the scope of the EU's GMO provisions<sup>3</sup>. It is not surprising then that the ECJ's reasoning stays mostly away from carefully analyzing wording and systematic context of the relevant law. Instead, the Court offers

basically one rather political argument to support its sweeping ruling: Allegedly, there was to be a gap in the system of comprehensive consumer protection if the presence of material from a GMO in a foodstuff such as honey did not fall within the scope of Regulation (EC) No. 1829/2003<sup>4</sup>.

The judges did not even take into account that the European legislator purposefully excluded several factual situations from the application of the Regulation, mainly in order to make it work in practice. Hence, the ECJ put its own political agenda in the place of a simple and sound application of the current law. How to cope with the consequences of the judgment was obviously not on the Court's agenda.

The ECJ's "bad law" in this case is written and – for the moment – cannot be undone. It is therefore important to analyse how to proceed in order to improve legal certainty and put the marketing of honey in the EU as much as possible on a sound foundation.

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1 See Hagenmeyer, *EFFL* (2011), pp. 291–293.

2 The legal maxim is often contributed to the US judge Rolfe and widely used to explain why exceptional cases are unfit to serve as basis for the drafting of general law.

3 Cf. Teufer, *ZLR* (2011), pp. 195 et. seq.

4 Cf. marginal 82 of the judgment.

## II. Starting Point: How does Pollen get into the Honey?

In several central parts of its judgment the ECJ states that the beekeeper is one of the sources for the presence of pollen in honey because combs with pollen are centrifuged in order to produce honey<sup>5</sup>. This factually incorrect information had already been entered into the proceedings at the national courts in Bavaria and obviously again in the correspondence with the European judges. The Court employs the alleged role of the beekeeper in contaminating honey with pollen to argue that pollen is "used" in the manufacture of honey according to the ingredient definition in Art. 6 para 4 lit. a) of Directive 2000/13/EC. This is how the judges arrive at the conclusion that GM pollen in honey is an "ingredient produced from GMOs" in the meaning of Art. 3 para. 1 lit. c) Regulation (EC) No. 1829/2003, thus opening the scope of the Regulation for the affected honey.

However, beekeepers all over the world will scratch their heads when looking at the factual foundation of the ECJ's main legal argument. Because it is best and actually common practice for beekeeping that beekeepers normally do not centrifuge combs with specific amounts of pollen<sup>6</sup>. Such combs where the bees store pollen for feeding their offspring are located in a different part of the beehive than combs with nectar and later honey<sup>7</sup>. Only the honeycombs are used by the beekeeper to harvest honey, not the combs which are specifically employed by the bees to store pollen<sup>8</sup>.

How does pollen get into the honey then? It is well known that pollen is already present in the nectar which is stored and worked upon by the bees in the honey-combs of the beehive. The pollen is carried into the nectar in early stages when the nectar is still in the plants to which the bees are flying. When the bees collect the nectar more pollen is mixed into the nectar because the pollen sticks to the bees' coats. This is how pollen is later further

mixed into the nectar while the bees move the nectar and work with it in order to produce honey<sup>9</sup>.

Thus, it is clear that honey is produced by the bees in the beehive and already at that stage contains coincidental amounts of pollen – be it of GMO origin or not. By centrifuging honeycombs the beekeepers do not produce honey, but harvest it. At that stage only very limited amounts of additional pollen can reach the honey accidentally because traces of pollen can be found everywhere in the beehive. However, the larger amount of pollen by far is already in the honey the beekeeper is harvesting. Any additional amounts are accidental contaminations when the best and common practice of centrifugation is employed.

With this factual background, that the ECJ was apparently not or not sufficiently aware of, the main legal argument in the „Bablock“-case amounts to an empty phrase. Pollen is not "used" in the production of honey and thus cannot be classified an ingredient<sup>10</sup>. It appears possible that the Court would have come to a different interpretation of Art. 3 para. 1 lit. c) Regulation (EC) No. 1829/2003 had the judges been correctly informed about the production and harvesting of honey. As a result, any national court in the EU having to interpret Art. 3 para. 1 lit. c) of Regulation (EC) 1829/2003 in the future is not necessarily bound to the ECJ's judgment because the factual background differs. Furthermore, national courts which are unsure about the correct interpretation of the scope of Regulation (EC) No. 1829/2003 in regard to honey should not hesitate to refer their cases to the ECJ again. This would give the European judges an opportunity to analyse Regulation (EC) No. 1829/2003 against a better factual foundation and apply EU law more carefully than it was done in the "Bablock"-case. In addition, the coming Regulation of Food Information with its new general labelling provisions can serve as a formal argument to refer the interpretation of the ingredient definition to the ECJ as Art. 6, para. 4 Directive 2000/13/EC will be abandoned<sup>11</sup>.

5 Cf. marginals 35 and 88 of the judgment as examples.

6 Cf. Horn/Lüllmann, *Das große Honigbuch* (1992), p. 124; Ternes/Täufel/Tunger/Zobel, *Lebensmittel-Lexikon* (4<sup>th</sup> Ed. 2005), p. 804.

7 Cf. *Der Schweizer Bienenvater*, reference book for beekeepers (1985), p. 146.

8 For all of the above cf. Horn/Lüllmann, *Das große Honigbuch* (1992), p. 124.

9 Cf. Teufer, *ZLR* (2011), pp. 195 at p. 198.

10 Cf. BLL, *ZLR* (2011), pp. 512 et seq., at p. 515 and Hagenmeyer, loc. cit., p. 292.

11 Cf. Hagenmeyer, loc. cit., p. 293.

### III. Legal Consequences when Pollen from GM-Plants is Detected in Honey

According to the ECJ's current jurisdiction any presence of traces of pollen from GM crops triggers the application of Regulation (EC) No. 1829/2003 with its authorization and labelling requirements. This means that beekeepers and honey importers have to analyse practically every batch of honey in order to get at least a clearer impression whether they are allowed to sell the honey in the EU in its present form. In this regard it is important to note that according to the ECJ's ruling the application of Regulation (EC) No. 1829/2003 is a legal question that has to be answered by legal analysis and in legal terms. The necessary laboratory analyses of honey can only serve as the factual foundation for the application of the law. Hence, the laboratory analysis has to follow the legal reasoning.

#### 1. Scope of Regulation (EC) No. 1829/2003: Proof of GM-Pollen in Honey is Needed

The starting point for the legal analysis whether Regulation (EC) No. 1829/2003 is applicable can only be the actual detection and proof of GM-pollen in honey – a suspicion is not sufficient. In its judgment the ECJ presupposes the factual presence of pollen in honey that can be traced back to its origin in a genetically modified plant. This is what the courts in Bavaria had stated as the facts of the case presented to the ECJ, even though only very small amounts of the specific pollen from MON810 maize had been detected in the honey affected there<sup>12</sup>. Thus, honey can only be subject to authorisation or labelling requirements if GM-pollen is present and detected in the specific glass or barrel of honey that is analysed in a laboratory.

#### 2. Origin of the GMO-Material that has been Detected

When looking for GM-pollen in honey specific DNA-sequences are analysed<sup>13</sup>. However, even if such a specific sequence is found, this does not automatically mean that its origin is pollen from a GM-crop. It is possible that other parts of GM-crops,

such as very small parts of fruits or of the plants themselves, are carried into the nectar that is used by the bees to produce honey and later harvested by the beekeeper. Such presence of GMO-material in honey was clearly not on the ECJ's mind in the "Bablock"-case. The judges were already faced with the facts from the courts in Bavaria clearly stating the GMO-material found in the honey there originated from pollen. Therefore the European judges did not discuss the difference between pollen as an ingredient (according to their interpretation) and a contamination of the honey independent from honey<sup>14</sup>. However, this legal demarcation exists and obviously was not denied by the Court. In the future the definition of an ingredient in the coming EU-Food Information Regulation will expressly state that contaminants are not regarded ingredients<sup>15</sup>.

As a consequence, when arguing that Regulation (EC) No. 1829/2003 is applicable it is necessary to prove that the GMO-material detected is material that can be traced to pollen originating from a GM-crop.

#### 3. Detection of GM-Pollen in Honey

If pollen from GM-crops is detected in honey there are basically two options: Either the GMO from which the pollen originates has a sufficient authorization pursuant to Regulation (EC) No. 1829/2003 for honey with the affected pollen or it does not.

a) Currently, there are several authorisations for GM-crops whose pollen typically end up in honey – such as soy or maize – that have a sufficient scope also for pollen and honey. These GMO are generally authorized as "food and food ingredients"<sup>16</sup>. In case it is established that pollen from such GMO is present, the honey can be marketed in the EU. The remaining legal questions concern only the possible labelling of the honey<sup>17</sup>.

12 Cf. marginals 36 and 37 of the ECJ-judgment.

13 Cf. marginal 36 of the ECJ-judgment.

14 Cf. Paal, *StoffR* (2011), pp. 214 et seq., at p. 216.

15 Cf. Hagenmeyer, loc. cit., p. 293.

16 Cf. Commission Decision 2010/419/EU dated 28 July 2010 on a specific maize. The authorization in Art. 2 lit. a) of the Decision reads: "foods and food ingredients containing, consisting of or produced from SYN-BTØ11-1 maize".

17 See below III. 5.

b) However, in countries outside the EU some GM-crops are cultivated which have not been authorised as GMOs pursuant to Regulation (EC) No. 1829/2003, mainly because there is no commercial motivation to do so. Furthermore, several current EU-authorisations, mostly the older ones, name specific products for which the authorization was granted. For example, this is the case for MON810, the GM-maize that was object of the ECJ's honey case. In the relevant authorisation the following products are mentioned: maize flour, maize gluten, maize semolina, maize starch, maize glucose and maize oil<sup>18</sup>. In this regard, the ECJ's reasoning makes clear that honey in which pollen originating from GMOs without sufficient authorization is detected must not be further marketed in the EU<sup>19</sup>.

c) A specific problem in this regard is the fact that there are some authorisations for so called "stacked events" which include the combination of two GMOs<sup>20</sup>. For example, in the case of MON 810 there is a sufficient authorization comprising food and food ingredients in general for a "stacked event" with MON810 and MON88017<sup>21</sup>. It is questionable whether the laboratory detection of the MON810 DNA-sequence alone in a sample of honey can be sufficient to classify the honey as non-marketable, even if it can be established that the DNA-sequence originates from pollen. Pursuant to the principle of proportionality, in such cases it can be required to also prove that there is no "stacked event" in which pollen from MON810 is present in combination with MON88017.

d) All of this results in a legally awkward situation: It is factually undisputed that current GMO-authorisations which are tailored to specific products as is the case with MON810 were not limited because of safety concerns regarding other products. On the contrary, EFSA has made clear that pollen from MON810 is as safe as the products listed in the present authorisation for MON810<sup>22</sup>. The relevant safety assessments in the authorisation process

mostly even covered pollen. The only reason why these authorisations were limited to specific products is that these products covered the applicants' commercial interests. Pollen was never included specifically because pursuant to the general legal opinion before the ECJ-judgment pollen was a natural "contaminant" that kept affected foodstuffs including honey outside the scope of Regulation (EC) No. 1829/2003. Thus, the present authorisation situation for several GMOs is only a formal limitation that is not backed by scientific safety concerns.

e) Two demands result:

- (1) Applicants should be encouraged to apply for wider GMO-applications covering food and food ingredients in general – most recent authorisations already follow this line<sup>23</sup>. On the basis of EFSA's scientific opinion that pollen is normally covered by the safety evaluations carried out in the relevant authorizations processes, the widening of the current authorisations should be done swiftly. Only rapid action will comply with the principle of proportionality in EU and national law.
- (2) According to the principle of proportionality it must also be possible for professional beekeepers, honey traders and honey importers to apply for administrative exemptions from the prohibition to market honey with traces of pollen originating from a GMO that is not sufficiently authorised in the EU. In Germany, this can and must be done by employing Sec. 68 German Food and Feed Act (LFGB). The factual situation in regard to honey is a typical form of application of these exemptions on the ground of proportionality: The affected honey can be freely marketed pursuant to the relevant law as soon as the relevant authorisations are amended. This is only a formal question and a matter of time because the general safety evaluation concerning pollen from GMOs has already been performed and published by EFSA, specifically for MON810<sup>24</sup>.

18 Commission Decision 98/294/EC.

19 Cf. Jany/Höfer, *DLR* (2011), pp. 487 et. seq., at p. 490.

20 Cf. Jany/Höfer, loc. cit., p. 491.

21 Commission Decision 2010/429/EU dated 28 July 2010.

22 See EFSA press release: EFSA supports European Commission with scientific advice on safety of

maize MON810 pollen dated 24 October 2011, available on EFSA's website.

23 Cf. Commission Decision 2010/419/EU dated 28 July 2010 on a specific maize. The authorization in Art. 2 lit. a) of the Decision reads: "foods and food ingredients containing, consisting of or produced from SYN-BT011-1 maize".

24 See above footnote 22.

#### 4. Food Safety and Rapid Alert System (RASFF)

Even before EFSA's publication on the safety of pollen from MON810 in honey there was no serious debate about the fact that the detection of pollen from unauthorised or not sufficiently authorized GMOs in honey does not affect food safety. All honey concerned is safe in this regard. This is true for both alternatives in Art. 14 para. 2 Regulation (EC) No. 178/2002.

a) According to scientific analysis honey with pollen originating from a GM-crop is not injurious to health; concerning MON810 EFSA expressly stated that pollen from this specific maize is as safe as the maize itself<sup>25</sup>. It also has to be taken into account that normally there is no more than 0.1 % of pollen in honey and only a fraction of that pollen can possibly originate from GMOs.

b) Furthermore, the affected honey is not unfit for human consumption. The provision in Art. 14 para. 2 lit. b) Regulation (EC) No. 178/2002 mainly aims at factual situations in which the objective average consumer would refrain from accepting a foodstuff because of disgust, e.g. in cases where the foodstuff is rotten<sup>26</sup>. Even a much wider interpretation of the provision that covers situations in which maximum levels of certain potentially harmful substances are exceeded does not include the presence of unauthorised or not sufficiently authorised GM-pollen in honey. The pollen concerned is still pollen and thus a natural component of honey, not a foreign substance<sup>27</sup>. Furthermore, the same honey that is affected by the ECJ's decision now has been sold in the EU for many years. Due to numerous publications about the presence of GM-pollen in honey most consumers even knew about the honeys' composition. Naturally, the honey could still be sold then and thus was obviously not covered by Art. 14 para. 2 lit. b) Regulation (EC) No. 178/2002. This factual situation in regard to honey has not changed. What has changed is only the legal interpretation of Regulation (EC) No. 1829/2003.

c) This also means that the detection of pollen originating from unauthorised GMOs in honey does not fall into the scope of the legal requirements to issue warnings in the EU's Rapid Alert System (RASFF)<sup>28</sup>. Again, there is no room for an automatic

application of these rules because food safety is not concerned. The same is true for a possible application of Art. 19 para. 1 or even para. 3 Regulation (EC) No. 178/2002 on the withdrawal or recall of affected honey from the market. Art. 19 Regulation (EC) No. 178/2002 can only be applied on the basis that a foodstuff is unsafe pursuant to Art. 14 of the Regulation. As pointed out above, this is not the case here. Furthermore, Art. 19 para. 1 Regulation (EC) No. 178/2002 expressly mentions the principle of proportionality<sup>29</sup>. Thus, the detection of pollen in honey, which under no circumstances can harm the human health, does not trigger the legal requirement to withdraw or recall the affected honey from the market.

d) In this regard, it must be added that pollen detected via a laboratory analysis concerns only the foodstuff from which the sample was directly taken. Because honey contains literally thousands of different particles of pollen from several plants and as it is possible that specific pollen particles cluster in the inhomogeneous foodstuff honey, there is no automatic conclusion in regard to other parts even of the same lot when specific pollen is detected in a sample of honey.

#### 5. Labeling of Pollen Originating from an Authorised GMO

If pollen from a sufficiently authorised GMO is detected, it is still to be assessed whether there is a legal duty to label the GMO-origin pursuant to Sec. 12 and 13 of Regulation (EC) No. 1829/2003. According to the statutory exemption in Art. 12 para. 2 the labelling rules "shall not apply to foods containing material which contains, consists of or is produced from GMOs in a proportion no higher than 0,9 % of the food ingredients considered indi-

25 See EFSA press release: EFSA supports European Commission with scientific advice on safety of maize MON810 pollen dated 24 October 2011, available on EFSA's website.

26 Cf. Zipfel/Rathke, *Lebensmittelrecht*, C 101, Art. 14 marginal 55.

27 Cf. marginal 77 of the ECJ-judgment.

28 Cf. Art. 50–52 of Regulation (EC) No. 178/2002.

29 The provision ends: "when other measures are not sufficient to achieve a high level of health protection".

vidually or food consisting of a single ingredient, provided that this presence is adventitious or technically unavoidable".

a) On the basis of the regular production process and harvesting of honey as mentioned above<sup>30</sup> there can be no doubt that the presence of pollen from GMOs is unintended and thus "adventitious". For the beekeeper it is impossible to control both the flight of his bees and the flight of pollen from cultivated GMOs. Once the pollen is on the bees' coats and in the beehive it will automatically enter the nectar and therefore the honey. At the same time it is technically impossible for the beekeeper to avoid the entry of such pollen into the honey that is marketed. There are no sufficient "hygienic" measures or similar tools to keep traces of pollen from contaminating already the nectar that is worked upon by the bees in the beehive in order to produce honey. Filtering the honey after the harvest will neither guarantee that no affected pollen is left. Furthermore, Directive 2001/110/EC expressly prohibits the removal of pollen from regular honey. Theoretically, a single beekeeper could try to avoid keeping the bees next to a field where GMOs are cultivated. However, as bees and pollen travel for many miles, this is practically impossible in countries with widespread GMO-cultivation. For honey traders and importers the option is non-existing as they rely on mixing honey harvested by several beekeepers whose actions they cannot fully control.

b) It is therefore decisive for the question of labelling GM-pollen in honey whether such pollen is detected in amounts above the 0.9 %-threshold in Sec. 12 para. 2 Regulation (EC) No. 1829/2003. This largely depends on the proper object against which the 0.9 % are measured. The wording of the statutory exemption mentions "the food ingredients considered individually or food consisting of a single ingredient".

aa) One possible interpretation of this wording is that the entire honey is the proper measure. According to the product-specific Honey-Direc-

tive 2001/110/EC honey does not contain ingredients and such substances must not be added. Thus, honey would consist of a single ingredient and serve as the proper measure for the 0.9 %-threshold.

bb) However, the ECJ's interpretation of Art. 2 para. 1 no. 13 and Art. 3 para. 1 lit. c) Regulation (EC) No. 1829/2003 appears to favour the classification of pollen as an ingredient of honey at least in the context of the GMO-Regulation. Then, pollen would be the proper object to measure the 0.9 %-threshold against. By analysing the ECJ's reasoning this can only be the overall content of all pollen in the honey affected and not the individual pollen species. This becomes clear when looking at marginals 35 and 36 of the judgment. In marginal 36 the Court refers to food supplements containing "maize pollen" as an ingredient while for honey in marginal 35 the judges refer only to "pollen". Furthermore, the Court does not mention a differentiation between "pollen" and "pollen particles" or specific strains when it is referring to the definition of "pollen" as an ingredient of honey in marginals 75-77. This is supported by the factual circumstances. The ECJ does not deny the legal definition that an ingredient must be "used" in the production of the foodstuff. However, both at the stage of the actual production of honey by the bees and also at the stage of the harvesting of honey by the beekeeper through centrifugation pollen is always present as a whole of combined particles originating from different plants, among them – possibly – GMOs. This is the case when the bee collects pollen and sticks particles together in order to form little "balls" that can be handled more easily. And it is still true on the coat of the bees, in the beehive and also in regard to honeycombs that are centrifuged by the beekeeper. All of this means that the proper object to measure the 0.9 %-threshold against can only be the overall content of pollen from different sources in the honey. This legal position appears to be supported in the EU-Commission and in the Member States<sup>31</sup>.

cc) It is legally irrelevant that laboratory analysis to inspect the 0.9 %-threshold in samples of honey currently seems difficult to perform. The application of Sec. 12 para. 2 Regulation (EC) No. 1829/2003 is a legal question alone. This legal

<sup>30</sup> See above II.

<sup>31</sup> Report of the Meeting of EU-Commission and Member States on 24 October 2011 (unpublished); different Jany/Höfer, *DLR* (2011), pp. 487 et. seq., at p. 491 with reference to other GMO-ingredients which, however, cannot be compared to pollen in honey as such other ingredients are actually used while the entry of pollen in honey is by coincidence.

question takes precedence to the factual requirements of laboratory analysis. Thus, in application of the principle of proportionality an affected beekeeper or company must only establish that it is unlikely that the 0.9 %-threshold is exceeded until there is proof to the contrary. The reason for this is that the amount of GM-pollen in honey will only possibly exceed a proportion of 0.9 % compared to the overall pollen content in very rare circumstances in which a beehive is located directly within a large GMO-cultivation with plants attractive for bees.

#### IV. Labelling of Pollen Independent of GMO-Origin

There is no direct reference in the ECJ's judgment to the labelling of pollen as an ingredient of the honey independent of a possible GMO-origin. This possible consequence was obviously overlooked by the Court even though the relevant definition in Art. 2 para. 1 no. 13 of Regulation (EC) No. 1829/2003 expressly states that "ingredient" means "ingredient" as referred to in Art. 6 para. 4 of Directive 2000/13/EC on the labelling of foodstuffs. Again, the entire pollen content of the honey could only be considered one ingredient because it enters the nectar and later the honey in combined form and because it is not manageable to separate all pollen particles present at any stage starting with the nectar and ending with the foodstuff honey. The result would be an ingredient list with the ingredient "pollen" – and which second ingredient? Even pursuant to the reasoning by the ECJ's Grand Chamber pollen is a natural part of honey<sup>32</sup>. Thus it is impossible to consider "honey" a second ingredient to "pollen". The second ingredient can neither be "nectar" because honey is produced by the bees from nectar and harvested by the beekeeper as "honey".

All of this demonstrates that a close interpretation of the ECJ's judgment probably does not allow any conclusion from the Court's reasoning in regard to the application of Regulation (EC) No. 1829/2003 to a classification of pollen as an ingredient pursuant to the general labelling laws<sup>33</sup>. The ECJ did not analyse nor decide about the labeling of pollen as an ingredient in honey. Hence, its interpretation of Art. 2 para. 1 no. 13 Regulation (EC)

No. 1829/2003 can only be seen in the context of the GMO-Regulation itself. Moreover, this is the only way to get the ECJ's judgment at least partly in line with Directive 2001/110/EC on honey which expressly states that no ingredients may be added to honey. Pursuant to the Directive it is not lawful to indicate an ingredients list for honey and the ECJ-judgment does not appear to aim at changing this provision.

#### V. Status Quo in Practice

Even after trying to come up with an interpretation of the ECJ's honey judgment in the "Bablock"-case that can somehow be made to work in practice, it is clear that the Court's reasoning has resulted in chaos. In practice, beekeepers and businesses trading honey all over the world must commission thousands of expensive laboratory analyses in order to determine whether they can lawfully market their honey in the EU. And because of the inhomogeneous character of honey they do not even know whether they can rely on the results of these analyses. Furthermore, it is impossible for most of them to fully control the possible entry of pollen from GM-crop into the honey they are trading. This is even true for small commercial beekeepers in countries such as Germany where the cultivation of GMOs has been severely limited. Still, there can be cultivations for scientific testing purposes nearby and pollen can be scattered to the winds and thus carried across borders from countries with commercial GMO-cultivation into countries without. Beekeepers and honey traders are at all times within reach of accidentally breaching the law. In the important honey trade with exporting countries in South and Central America barrels of honey are shipped back out of the EU or never sent into the EU giving rise to WTO-complaints and a loss of faith in longstanding business relations. What is needed is a workable interpretation of the current law and in the longer run amendments to the legal provisions concerned.

<sup>32</sup> Cf. marginal 77.

<sup>33</sup> Ambivalently Paal, loc. cit., p. 216.

## VI. Conclusion

"Bad law makes hard cases" is another proverb that comes to mind when thinking about the consequences of the ECJ-judgment in the "Bablock"-case C-442/09. The Court's ruling is based on a false factual foundation, does not sufficiently take into account the systematic context of the legal term "ingredient" and invents the judges' own spirit and purpose of Regulation (EC) No. 1829/2003 while neglecting the legislator's original intention. Thus, the judgment results in an erroneous application of the law.

One can probably also say that bad law does not get better when a court uses badly written provisions to establish new legal policies. This has been done here in court proceedings which were focused

on political intentions from the beginning. Hence, the ECJ has been used by the claimants as much as honey has been used by the Court in order to write legal policy on the hard fought topic of GMOs. The result is legal and economic uncertainty for honey producers both in the EU and overseas as well as for honey importers.

Thus, as beekeepers and honey importers cannot avoid coincidental traces of pollen from GM-crops in honey, Regulation (EC) No. 1829/2003 must be amended to expressly exclude honey or an upper limit for pollen from GMOs in honey has to be established. For once, the current "hard cases" for beekeepers and businesses trading honey should cause "better law" by motivating the EU-legislators to reform the existing regulations. It is time to face reality.