# The New Strategy on Coexistence in the 2010 European Commission Recommendation

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## I. Introduction: What is coexistence? – From moratorium to partial moratorium

The European Union tried to establish a "coexistence" policy for the cultivation and processing of GM and non-GM products after the political agreement that put an end to the 1999-2004 moratorium. Consequently, coexistence is part of this gentlemen's agreement between States with pro and anti-GMO positions. Anti-GMO States unblocked proceedings of authorisation of new products by accepting the *sound science* criteria of the risk assessments of the EFSA as almost the only element to open the doors of the internal market. In exchange, these States got the opportunity to decide on how GMO would be cultivated in their jurisdiction, mainly under the pretext of guaranteeing the isolation of the three chains in "coexistence"[2]. As this article will demonstrate, this basic agreement has not changed.

According to the rather soft-law attempt of harmonization of the 2003 Recommendation of the European Commission, "coexistence refers to the ability of farmers to make a practical choice between conventional, organic and GM-crop production, in compliance with the legal obligations for labelling and/or purity standards". That is to say, Member States could set up binding and/or non-binding good practices of isolation in order to guarantee farmers' right of choice and compliance with [European] labelling and traceability standards (the 0.9 % threshold). Moreover, in some cases, Member States established specific liability rules to compensate for economic loss in case an "adventitious mixture" could not be avoided. This was a project of "pluralisme technologique"[3] that aimed at avoiding a rapid technological substitution of conventional crops by GM ones, and at guaranteeing the survival of organic production that had renounced biotechnological tools.

Although the idea of slowing down technological substitution is based on the precaution principle and in spite of its political origin, coexistence policy was always based on the objective of avoiding "economic" losses caused by an adventitious mixture. However, under no circumstances should national coexistence rules or special arrangements for liability prevent or excessively burden GM production. From the 2003 recommendation until the present day, the European Commission has tried to promote a field-by-field segregation policy where good practices of coexistence should not go beyond the 0.9 % rule. Theoretically GMO-free and GMO exclusive production zones could only be established by private agreements among farmers, which have proven to be very difficult to achieve in practice.

However, that strategy did not work. Some anti-GMO countries (the best example is Austria) used the flexibility of the coexistence policy to adopt very strict coexistence rules. It is difficult to discern how these would operate in practise, since many of these countries also used the safeguard clause of Directive 2001/18. Consequently, in those cases, the national coexistence rules were part of a partial moratorium strategy. In cases where there was no safeguard clause (for example in Germany before April 2009), severe coexistence rules combined with a strict liability scheme significantly reduced the introduction of GM production, because field-by-field isolation costs (and compensation risks) were higher than the economic advantages of GM production. In GMO friendly countries (Spain) there were and still are no coexistence rules; the technological substitution process therefore took place rapidly. The only country where there was something similar to coexistence was Portugal. There the government, seed companies, and farmers' associations worked together to create GMO-free regions and GMO production zones.

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1 Concerning the history of the EU GM crop regulatory framework see S. Morris in this issue.

2 Marie-Angèle Hermitte, S. Anvar, M. Bonin *et al.*, "Legal Issues – An Overview on Coexistence Policies: Technological Pluralism, Confidence Economy, Transnational Supply Chains", in Y. Bertheau *et al.* (eds), *GM and non-GM Supply Chains: Their Coexistence and Traceability* (Blackwell/Wiley, forthcoming).

Nevertheless, even in that case, problems with reaching a consensus among all farmers made it difficult to establish GMO-free regions (finally they were established only on the island of Madeira and in the Lagos district in the Algarve).

After seven years of "coexistence" policy several conclusions can be drawn. Firstly, it is very difficult to separate safety from socio-economic arguments whenever we talk about food products; secondly, without binding isolation rules the technological substitution process is inevitable; and thirdly, field-by-field segregation is too complicated and its costs overtake the economic advantage of the new technology, which necessarily leads to a region by region strategy[3].

In this context, and without having taken action against clearly disproportionate national legislation on "coexistence"[4], the European Commission decided to change its strategy and replace its 2003 Recommendation as part of the 2010 Reform.

This paper will analyse the main innovations of the 2010 Recommendation and the impact it has on coexistence policy.

## II. Main innovations of the 2010 recommendation and their immediate impact

The new 2010 Recommendation[5] replaces the one from 2003/556/EC. Nevertheless, key elements of the coexistence policy remain in force. Both Recommendations are founded on Article 26a of Directive 2001/18 (which has not been changed by the reform) and, consequently, essential elements of the coexistence policy are still applicable. These are namely the avoidance of the unintended presence of GMOs in other products, the guarantee of the right of choice between different technologies of food production thanks to a label/traceability system and finally the establishment of a threshold for drawing boundaries between them[6]. However, in the new Recommendation, the European Commission reduces its target of harmonization,[7] allowing Member States to develop a more flexible approach in the establishment of measures to guarantee isolation. In particular, according to the new Recommendation, Member States can "take into account their regional and national specificities and particular local needs of conventional, organic and other types of crops and products." In practice, this recognises the legitimacy to protect voluntary GM-free labelling and below 0.9 % thresholds as well as the legality of GMO-free regions created because of the characteristics of farm structures or natural conditions in a region.

Nevertheless, more flexibility does not mean absolute freedom or, in other words, a "re-nationalisation" of the coexistence policy. Article 26a of Directive 2001/18 establishes the limits of the flexibility Member States have in the avoiding a "potential economic impact of the admixture of GM and non-GM crops". Consequently, States should still not eliminate one type of production in their whole territory, at least basing this prohibition on coexistence

3 A recent economic paper confirms this approach: "The difference in incremental benefits and cost between GM and non-Gem farmers provide incentives for regional agglomeration of either GM or non-GM farms", Volker Beckmann, Claudio Soregaroli and Justus Wesseler, "Ex-Ante Regulation and Ex-Post Liability under Uncertainty and Irreversibility: Governing the Coexistence of GM Crops", Economics Ejournal Discussion Paper 2009-53, 4 December 2009, at p. 25, available on the Internet at <http://www.economics-ejournal.org/economics/journalarticles/2010-9> (last accessed on 28 October 2010).

4 Some coexistence regimes were so strict that, in practice, they prevented the cultivation of GMO and therefore violated Art. 22 of Directive 2001/18/EC of the European Parliament and of the Council of 12 March 2001 on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC – OJ L 106, 17.4.2001. In this connection, please see the observations made by the European Commission on 26 July 2004 about the strict liability regime for GM cultivation imposed in Germany: "In general, the proposed liability regime is likely to lead to a high and unpredictable economic risk for GMO farmers. The Commission would therefore only agree to the draft on the conditions that these provisions do not actually prevent the cultivation of GMOs in Germany." (Communication SG(2004) D/51510 – TRIS Ref. 2004/0133/D, in the Directive 98/34/CE framework). However, the European Commission has not initiated judicial proceedings through the ECJ. In this connection please see also Matthias Herdegen, "The Coexistence of Genetically Modified Crops with Other Forms of Farming. The Regulation by EU Member States in the Light of EC Law", 2 *Journal of International Biotechnology Law* (2005), pp. 89 *et sqq.*, at p. 92.

5 Commission Recommendation of 13 July 2010 on guidelines for the development of national co-existence measures to avoid the unintended presence of GMOs in conventional and organic crops, 2010/C 200/01, OJ 2010 C, 22/07/2010.

6 Conf. Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the freedom for Member States to decide on the cultivation of genetically modified crops, COM(2010) 380 final, at p. 5.

7 The European Commission recommendation did not mention harmonization among its aims. However, like any guideline document that "should provide a list of general principles and elements for the development of national strategies" (Recital 2), it clearly aims to avoid excessive divergences.

grounds[8]. However, it must be acknowledged that more flexibility will increase the possibility of abuse and the establishment of trade restricting measures. Consequently, the proportionality requirements that were already present in Recommendation 2003/556/EC will necessary acquire more relevance in Recommendation 2010/C 200/01.

## 1. Consumer choice as *Leitmotiv* of the new strategy and the dilution of the 0.9 % rule

The 2003 Recommendation focused its attention on the diversity in supply and defined coexistence as the "ability of *farmers* to make a practical choice between conventional, organic, and GM-crop production". Although consumer choice was "linked to" coexistence, it had not been included in that definition. Thus, several national legislations[9] filled the gap and put consumers' choice at the same level as farmers' freedom by including it in their definition of coexistence.

The emphasis of the 2003 Recommendation on farmers' right of choice explains why it did not support compulsory coexistence measures to guarantee below 0.9 % thresholds or GM-free labelling. Such measures would be so restrictive that they would in practise necessarily entail a prohibition of GM cultivation, thereby reducing farmer choice. In fact, the 0.9 % rule was a political agreement to guarantee diversity. Not only does it establish the boundaries between GM and non-GM production, but it also reduces the cost of isolation by introducing a margin of tolerance in the event of adventitious presence. Since there is no GMO labelling obligation below 0.9 %, in case of an adventitious presence below this threshold, there would be no economic loss. Therefore, according to the 2003 Recommendation, there would be no need to have compulsory coexistence rules. However, this would not prevent specific production with a threshold below 0.9 % whenever private agreements would establish such a production.

The new Recommendation completely changes this strategy and centres the diversity guidelines on demand rather than on supply. According to the new definition, co-existence measures are those that aim "to allow consumers and producers a choice between conventional, organic and GM production"[10]. Although the wording seems to put consumers and producers on an equal footing, in practise it puts consumers in a stronger position since they can determine the threshold among the three types of production mentioned, and even expand the scope of protection to new ones such as GM-free products: *"In certain cases, and depending on market demand and on the respective provisions of national legislation (e.g. some Member States have developed national standards for different Types of 'GM-free' labelling) the presence of traces of GMOs in particular food crops – even at a level below 0.9 % – may cause financial harm to the operator who would wish to market them as not containing GMOs."*[11]

8 The proposed introduction of 26b in the Directive 2001/18 (*supra* note 4)could allow Member States to prohibit GMO cultivation *on grounds other than those related to the assessment of the adverse effect on health and the environment*. As Sara Poli and Maria Weimer explain in their articles, this *opt-out clause* should be specified. Although both the *opt-out clause* and the new recommendation on coexistence are part of the new strategy of the European Commission to give more freedom to Member States to decide on the cultivation of GMO, mainly on socioeconomic grounds, we think that they have different natures. From our point of view, the *opt-out clause* is not related to the guarantee of diversity in production (the coexistence aim) but, on the contrary, it is a new safeguard clause of the single authorisation procedure based on "other legitimate factors", i.e., not scientific factors. This interpretation could be supported by the explanations of the European Commission in its Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions on the freedom for Member States to decide on the cultivation of genetically modified crops, COM(2010) 380 final, at p. 7: "[The *opt-out clause*] is thus a further option for Member States to adopt measures in relation to authorised GMOs, in addition to the measures that they are already entitled to take by application of Article 26a of Directive 2001/18/EC to avoid the unintended presence of GMOs in other crops". See also the Explanatory Memorandum of 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, COM (2010) 375 final – 2010/0208 (COD), at p. 3: "the scope of the new [Coexistence] recommendation, which mirrors Article 26a of Directive 2001/18/EC, can only refer to measures aimed at avoiding the unintended presence of GMOs in other crops, with offer fewer margins for Member States to decide than under a comprehensive legal amendment [like the *opt-out clause*]".

9 Art. 1 of Wallon *Décret relatif à la coexistence des cultures génétiquement modifiées avec les cultures conventionnelles et les cultures biologiques du 19 juin 2008*, published in the *Moniteur Belge* on 8 August 2008. Explanatory Statements of the German Act reorganising legislation concerning genetic engineering (*Gesetz zur Neuordnung des Gentechnikrechts – GenTG*), published in the *Bundesgesetzblatt* on 3 February 2005. Explanatory Statements of the Portuguese *Decreto Lei* Nº 160/2005 of 21 September 2005, published in the *Diário da República* on 21 September 2005. Art. L. 531-1 of the French *Code de l'Environnement* (in accordance with the version established by the French *Loi n° 2008-595 du 25 juin 2008 relative aux organismes génétiquement modifiés*, published in the *Journal Officiel de la République Française* on 26 June 2008).

10 Recommendation 2010/C 200/01, *supra* note 5, recital (3).

11 Recommendation 2010/C 200/01, *supra* note 5, point 1.1.

Thus, the right of producers is determined by consumers, and more precisely, by the existence (or lack thereof) of consumers who demand 100 % GM-free products. Only in case there is a market demand for below 0.9 % products would the new 2010 Recommendation allow Member States to protect that production by establishing compulsory isolation measures as strict as necessary. The declaration of GM-free regions would be the strictest of these legal isolation measures. In this scenario the right of choice of farmers would be seriously reduced because they would not be able to cultivate using GM; but the right of choice of consumers would remain intact since they could still buy imported GM products.

It seems that this change of approach encouraged a change in the department of the European Commission charged with the coexistence policy. While the 2003 Recommendation was signed by Franz Fischler, Commissioner for Agriculture, Rural Development and Fisheries; the 2010 one is signed by John Dalli, Commissioner for Health and Consumers.

## 2. Diversity of farming conditions, the new approach regarding organic farming, and the reinforcement of the GMO free regions doctrine

Until now, the scientific risk assessment for authorisation[12] as well as the former coexistence Recommendation[13] took local particularities into account. In the risk assessment it is possible to avoid the introduction of GM in a particular region if the new product could somehow endanger the local environmental characteristics (local flora or fauna), which is very difficult to prove in practice. Under the Recommendation special farming structures could justify stricter isolation measures, but only to achieve the 0.9 threshold applicable for both conventional and organic production. That is to say, it could restrict coexistence but not prohibit the cultivation of GMOs[14].

However, some countries (Austria, Hungary, Italy) and, in particular, local and regional authorities of the GMO-free region network[15] considered these measures to be insufficient and they have argued for the necessity of establishing GM free regions to protect their farming systems.

The new 2010 Recommendation responds to these demands and puts special emphasis on the diversity of farm structures and farming systems, and on the economic and natural conditions under which farmers in the EU operate. It acknowledges that particular segregation needs are very difficult and costly to implement efficiently in some geographical areas, which makes it necessary to give Member States sufficient flexibility. This declaration is not incompatible with the former recommendation *per se*. However, the new Recommendation does go further in this matter, separating the natural connection between threshold and isolation measures, and recognizing the possibility of establishing stricter isolation measures for quality products, such as organic ones. The Recommendation does not say that organic farming should have a below 0.9 % threshold[16], something that is likely to be under discussion as we speak. However, it affirms, "since [organic] production is often more costly, stricter segregation efforts to avoid GMO presence may be necessary to guarantee the associated price premium". However, in combination with the particularities of farm structures these stricter isolation measures would almost certainly lead to the declaration of GM-free regions. The point is that these GM-free regions will not be based on a particular threshold or a measurable data, but on consumers' expectations created by premium quality products. The lack of a clear threshold to control the proportionality of the isolation measures and the possibility of creating binding and restrictive

12 Art. 19(3)(c) and Annex II of Directive 2001/18/EC (*supra* note 4) and Art. 6 and 18 of Regulation (EC) nº 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (Text with EEA relevance), OJ L 268, 18.10.2003, pp. 1–23.

13 Recommendation 2010/C 200/01, *supra* note 5, point 2.1.4.

14 In practice very strict and costly isolation measures consolidate a region as non GM farming; and likewise the risk of crosspollination causes the expulsion of organic farmers from a region with a high number of GM farms.

15 See "Charter of the Regions and local Authorities of Europe on the Subject of Coexistence of genetically modified Crops with traditional and organic Farming", Florence, 4 February 2005, available on the Internet at <http://www.gmofree-euregions.net:8080/docs/ajax/ogm/Charter_en.pdf> (last accessed on 28 October 2010).

16 It merely quotes recital 10 of Regulation 834/2007 that says that the aim is to have the lowest possible presence of GMOs in organic products. See Council Regulation (EC) No 834/2007 of 28 June 2007 on organic production and labelling of organic products and repealing Regulation (EEC) No 2092/91, OJ L 189/1, 20.7.2007, pp. 1–23.

rules based on quality grounds would almost surely have important trade related consequences.

## 3. The renewed importance of the proportionality test

Proportionality control can be divided into three tests according to the jurisprudence of the ECJ[17]: adequacy[18] (of the measure attaining its objective), necessity[19] (the impossibility of achieving the objective with less restrictive measures) and *strictu sensu* proportionality[20] (of the objective itself).

In the former Recommendation, proportionality controls were quite easy to implement. There was only one threshold, and consequently only one objective to be pursued. All the isolation measures that went beyond this objective did not fulfil the adequacy test. Moreover, if the threshold could be reached through less restrictive measures, the measure did not fulfil the necessity test. No one questioned the *strictu sensu* proportionality of the objective itself since it was established by the European legislation.

However, with the new 2010 approach, the 0.9 % threshold is not always the "objective" to attain. Now Member States can develop new and stricter isolation measures to protect special crops (for example "GM-free" ones) and even prohibit the cultivation of GMOs entirely if the combination of special farming structure plus the expectation of consumers (in terms of quality) demands measures that are as strict as possible.

Consequently, to apply the adequacy and the necessity tests now it is necessary to identify what the "objective" is and to give it a measurable score (the standard of 0.9 %, 0.1 %, technical zero). Contrary to the former Recommendation, currently the objective of the national coexistence law could be disproportionate *per se* in relation to EU freedom of goods (*strictu sensu* proportionality test). This is why objectives that are stricter than the European standard (0.9 % level) need special justification arguments.

Once the objective is determined, it is quite easy to establish if the threshold (adequacy test) is reached, and to compare the proposed measures with other possible measures (necessity test); naturally while "taking into account the regional and local constraints and characteristics, such as the shape and size of the fields in a region, the fragmentation and geographical dispersion of fields belonging to individual farms, and regional farm management practices"[21]. Once compared, if these measures were the least restrictive ones, they would be proportionate. The Recommendation includes a particular requirement of argumentation concerning GM-free areas[22], showing that they should be analyzed under stricter standards of proportionality than other coexistence measures. In practice, the proportionality test will be applied through the notification requirements of Directive 98/34.

Finally, even though the 2010 Recommendation affirms that matters concerning financial compensation or liability for economic damage fall within the exclusive competence of Member States[23], they would never be excluded from the control of proportionality since even in areas of national competence, Member States are still required to comply with EU law and with Articles 35/36 TFEU and related case law in particular[24].

## III. Concluding remarks

From a political point of view it is clear that the new strategy of the European Commission is based on pragmatism. As Dr. Poli says, things probably will not change in the immediate future[25]. Offender countries have obtained a way to legalize their measures while GM producing countries (both from

17 Francis Jacobs, "Recent Development in the Principle of Proportionality in European Community Law" and Takis Tridimas, "Proportionality in Community Law: Searching for the Appropriate Standard of Scrutiny", in Evelyn Ellis E. (ed.), *The Principle of Proportionality in the Laws of Europe* (Oxford: Hart Publishing 1999), pp. 1–22 and 65–84.

18 For example, Case C-189/95, *Criminal proceedings against Harry Franzén* [1997] ECR I-05909, at para. 76; Case C-317/92, *Commission of the European Communities v. Federal Republic of Germany*, 1994 ECR I-02039, at para. 16.

19 There is important case law on this issue, particularly on Art. 36 TFEU. Among others see Case C-131/93, *Commission of the European Communities v. Federal Republic of Germany*, [1994] ECR I-03303, at para. 18; Case C-473/98, *Kemikalieinspektionen v. Toolex Alpha AB*, [2000] ECR I-05681, at para. 40; Case C-217/99, *Commission of the European Communities v. Kingdom of Belgium*, [2000] ECR I-10251, at para. 28; Case C-170/04, *Klas Rosengren and Others v. Riksåklagaren*, [2007] ECR I-04071, at para. 43.

20 This is the most controversial control. See, for example, Case 302/86, *Commission of the European Communities v. Kingdom of Denmark,* [1988] ECR 04607, paras. 20–21; and the Opinion of the Advocate General Sir Gordon Slynn in the same case.

21 Recommendation 2010/C 200/01, *supra* note 5, point 2.2.

22 Recommendation 2010/C 200/01, *supra* note 5, point 2.4.

23 Recommendation 2010/C 200/01, *supra* note 5, point 2.5.

24 See the contribution by Maria Weimer in this issue.

25 See the contribution by Sara Poli in this issue.

within the EU and from outside) can continue selling their crops for consumption. Nevertheless, it is interesting to analyse the legal arguments underpinning this change and their consequences in the event of a radicalization of positions.

Firstly, nowadays, the policy of coexistence centres more on consumers' choice than on farmers' choice. Guaranteeing the viability of premium products plus the particularities of farm structures could justify the restriction in the GM supply. But, at the same time, it could consolidate premium quality products (organic and GM-free), which would increase supply. Market demand will therefore encourage supply with the support of more responsive authorities.

Secondly, the 0.9 % rule has been diluted, but it continues to be the European standard that guides European Coexistence Bureau Recommendations on best practices[26]. Any coexistence measure founded on a different objective should be justified in terms of proportionality.

Thirdly, the coexistence policy is not being renationalized[27] (mainly because it has never been harmonized at an EU level), but it is becoming increasingly flexible and closer to the SPS Agreement philosophy[28]. In both cases compliance with international/European standards should presuppose the compatibility of the measure with trade law. Thus, if a Member aims to establish a measure that is stricter than the standard one, it would have to prove the necessity of a higher objective and the proportionality of the measures taken to achieve it.

Finally, the success of the whole scheme depends on the strength of proportionality controls at EU levels. It is probable that these controls will be weak in relation to GM-reluctant countries, mainly because they have the *opt-out clause* in any case. However, from a long-term perspective, the consolidation of large GMO-free regions in Europe could cause tensions in WTO law. Almost surely there will be trade implications regarding GM seeds and very probably there will be indirect discrimination effects against GM products. Moreover if national authorities avoid the use of GM feed in livestock breeding in their GMO-free regions, legal friction with international trade law seems inevitable.

In conclusion, it seems that the 2010 Recommendation will consolidate the current concentration process between GM-free and GM-exclusive production regions. However, if these are well distributed from an EU point of view the original objectives of the coexistence policy would be guaranteed.

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26 Marta Czarnak-Kłos and Emilio Rodríguez-Cerezo, "Best Practice Documents for Coexistence of genetically modified Crops with conventional and organic Farming: 1. Maize Crop Production", European Coexistence Bureau (ECoB) and Joint Research Centre (JRC), September 2010, available on the Internet at <http://ecob.jrc.ec.europa.eu/documents/Maize.pdf> (last accessed on 29 October 2010).

27 On the contrary, see Sara Poli in this issue.

28 It is true that the SPS agreement is focused on sanitary and phytosanitary risks while the coexistence policy focuses on socio-economic risks. However, taking into account that SPS measures could include measures to prevent economic damages produced by the presence of GMO whenever they are unwelcome (*EC-Biotechnological Products*, Panel Report, WTO Docs WT/DS291/R, WT/DS292/R and WT/DS293/R, 29 September 2006, at para. 7.2576), there are some possible connections between them.