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Consultation on proposals for managing the coexistence of GM, conventional and organic crops

The government have made a clear decision that compensation for loss arising out of the coexistence of GM and non-GM production should be borne by the GM sector. The paper outlines various options for financing that obligation. Private insurance is not considered a viable option at this time. There is no consideration of the situation where a GM crop is damaged by the presence of a non-GM contaminant.

Tests of contamination

Redress should be limited to non-GM farmers who can demonstrate that there is a GM presence above 0.9% in their crop through no fault of their own. In order to demonstrate no fault and a just claim on their part, non-GM farmers may need to produce evidence, for example to confirm that:

- non-GM seed was used (i.e. one that was below the relevant seed labelling threshold adopted by the EU).
- the affected crop was destined for a premium non-GM or organic market.
- any obligations arising from the coexistence regime had been complied with (e.g. accurate information was given in response to a GM neighbour's notification, and cropping plans were not subsequently altered in a way that compromised the required separation distance).
- the finding of a GM presence above 0.9% was based on samples taken in accordance with a recognised protocol and tested at a suitable accredited laboratory.

Existing law

In principle, non-GM farmers who suffer a loss would be able to seek redress through the civil courts under the current law. The non-GM farmer could seek an injunction and/or damages under the common law of tort, claiming negligence or private nuisance. However, the application of the common law of negligence or private nuisance to GM 'contamination' is untested and uncertain. To recover economic loss, the non-GM farmer would need to show either damage to his property and the loss derived from that damage or, where there was no such damage (i.e. pure economic loss), that the defendant had a duty of care to the non-GM farmer such that recovery of that loss would be fair. It is not certain whether a GM presence in a non-GM crop would be regarded as damage by the courts. A GM crop will only be grown commercially if it passes the legal risk assessment process, so it may be a contradiction to treat as a form of damage the unintended presence of a legally-approved GMO.

A fault based system would have the benefit of encouraging farmers etc. to comply with guidance. However, it could also leave the claimant with no compensation if the farmer had not been negligent. A possibly fairer system would be a no fault system where all GM farmers to share the bill equally but this would not encourage compliance with guidance.

An incentive for compliance would be provided if the seed companies were to withdraw the product from farmers who did not comply with an effective coexistence regime.

A voluntary redress 'charter' is being developed by the farming and industry group SCIMAC, as part of its wider proposals for an industry-led coexistence regime. The SCIMAC plan involves the GM seed companies committing to a charter whose aim is to restore the market position of any non-GM farmer whose crop exceeds the 0.9% threshold through no fault of their own. It envisages a number of ways that redress could be provided, including:

- direct replacement of affected produce (i.e. crop substitution)
- indirect replacement of affected produce (e.g. 'virtual' crop substitution, where affected produce is directed to an outlet and the claimant paid as if the crop were as originally intended)
- direct cash compensation
- compensation 'in kind'

The paper describes at length what the various options would be for a state managed compulsory insurance pool based on strict liability. The immediate potential for a private insurance market solution is dismissed:

Whilst Defra remains open to the idea of an insurance market developing, it does not see this as a solution in the short-to-medium term. Therefore, the issues around a possible insurance market have not been explored in this paper.