

Dear Friends in IFOAM,

the following paper reflects the discussion of a working group of FIBL, OEKO-Institut and the undersigned at the GRUENE WOCHEN in Berlin January 2002. We are about to finish a report commissioned by the German Federal Environmental Protection Agency (Umweltbundesamt) on the German legal situation and strategies for organic farmers in the farming environment of Middle Europe. Attached you find a description of the status quo (de lege lata). There will also be a part with suggestions how to improve the German legal framework (de lege ferenda).

We would very much like to have your comments and the role of causality liability of growers of transgenic crops and your suggestions which instruments may be used. Please send your comments to [hps@prolink.de](mailto:hps@prolink.de). We would need them in the course of this month (March 2002).

With kind regards  
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**Strategies for Organic Farmers to Minimize and Manage Risks of Genetic Modification by Pollen Drift from Neighboring Transgenic Fields in the Legal Environment of Germany: Liability of Growers of Transgenic Crops for Genetic Contamination based on Causality (§ 906 German Civil Code) - Relief of Transgenic Pollen Drift only to be won by Tedious Preservation of Evidence? -**

**(1) END OF EU-GMO-MORATORIUM in 2003: FIRST LARGE SCALE TRANSGENETIC POLLEN NEIGHBORHOOD CONFLICTS IN VEGETATION PERIOD 2003**

**Presently in Germany the risk of contamination of organic crops by transgenic pollen from neighboring conventional fields is confined to the neighborhood of very few trial lots, since in Germany GMO-crops are not**

approved for general agricultural production due to a *de facto* moratorium in the European Union. However, the EU-Commission has suggested to end this moratorium, when it presented a draft food law in Summer 2001, which would require the labeling of food products when genetically modified organism or their derivatives have been used in its processing. Consequently, in Europe the neighborhood of transgenetic and organic crops, which are vulnerable to the impact of transgenetic pollen, may for the first time be expected in the vegetation period 2004. Organic farmers will not find buyers willing to pay organic premium prices for crop products which show genetic modifications. They will either find no buyer at all or they will have to sell at the price level for conventional production. The current 1%-threshold-concept of Commission Regulation (EC) No. 49/2000, above which the indication of the presence of the genetic modification on the label of food products is compulsory, is not likely to be abandoned. Since 70 % of consumers in Europe reject genetic modification in food production, all interested parties, including seed producers and the large farmers associations agree on the necessity to label GMO-foodstuffs. They perceive such labeling as a means to render legitimization to the legislative decision to permit GMO's in food production at all by offering transparent choices to consumers. While the consensus, that food products should be labeled, to let consumers decide, seems universal, this consensus does not comprise the type of labeling and levels of presence of genetic modification, which would trigger GMO-labeling: The Bundesverband des Deutschen Lebensmittelhandels (Federal Association of German Food Traders) supports the Commission's draft, which requires labeling, where GMOs have been used in production, in cases also, where the food staff does not show analytically identifiable traces. The Bundesvereinigung der Deutschen Ernährungsindustrie (Federal Association of German Food Processors) opposes such "processing labeling". Both labeling concepts would make organic farmers suffer significant losses of the market value of their crops, if genetic modifications are present due to the drift of transgenetic pollen into their cultures. Organic farmers in Germany will therefore ask: Is there a legal lever to stop our conventional neighbors from planting transgenetic crops? Is there a basis for the recovery of expenditures necessitated by the possible impact of transgenetic pollen drift from neighboring fields? Is there a legal basis for claims to be compensated for a loss of market value of organic crop products due to the presence of genetic modifications introduced by drift of transgenetic pollen?

## **(2) NATIONAL LEGAL MECHANISMS IN EU MEMBER STATES PROVIDE FOR NO FAULT LIABILITY: EXAMPLE GERMANY § 903 CIVIL CODE**

The law of the European Union does not provide for mechanism to conciliate conflicts between neighboring growers of organic and transgenetic crops. However, there are mechanisms under the national legal systems. In Germany §§ 903 ff. Bürgerliches Gesetzbuch (Civil Code) regulate the relations between the users of neighboring pieces of land:

Structural Balance of Interests by § 906 German Civil Code between Conventional Farmers Growing Transgenetic Crops and Neighboring Organic Farmers

*Transgenic Pollen emanating from one piece of land onto another piece of land* = Intrusions (soot, heat, noise, vibrations or similar interference (of *imponderables* = things which close to being Organic crop cultivation significantly impaired by the introduction of genetic modifications into the organic harvest by transgenic pollen

Intrusion is unavoidable by measures, which are reasonably to be expected from growers of transgenic crops from an economic point of view

No impediment of use of organic farm or earnings beyond proportionate degree (which may be the case, when transgenic pollen does not cause genetic modification above a level of general environmental noise)

Interference impedes the use of the piece of land in line with local usage or its earnings beyond a proportionate degree (which is the case when an organic farmer suffers from a loss of market value of his harvest due to the presence of genetic modification introduced by transgenic pollen emanating from a neighboring field)

Intrusion is unavoidable by measures which are reasonably to be expected from growers of transgenic crops from an economic point of view (for example, in the case of conventional crops who have alternative locations for plants in distant organic neighboring areas). Organic farmer is entitled to the continuation of the neighboring use to choose to avoid the intrusion.

No prohibition order and no claim for compensation

Organic farmer may demand an appropriate compensation in money

**In France case law from the application of Art. 1382 Code Civil on relations between neighbors (*troubles de voisinage*) provides for liability without fault (Viney and Jourdain 1063-4; Le Tourneau and Cadiet 815-6). In England the tort of private nuisance controls interference with the use of land emanating from another piece of land. The rule in *Rylands v. Fletcher* concerns the escape of**

harmful substances from one piece of land to another. *Cambridge Water Co. v. Eastern Countries Leather Plc.* shows, that neither of the torts requires fault or negligence on the part of the user of the piece of land from which the interference emanated. The tort of nuisance applies where damage was foreseeable and where the use of land was unreasonable. Under the rule in *Rylands v. Fletcher* liability for reasonably foreseeable damage is prescribed, if the presence of the substances emanating from on the defendant's land constituted a *non natural use* of the defendant's property for the escaping substances to be there. When assessing the reasonableness of use under the tort of nuisance, account will be taken of the character of the neighborhood, the duration of the interference, the significance of the disadvantage for the average user and the motifs for the use of the land which caused the interference (Clerk & Lindsell 959-61; Markesinis and Deakin 464-6). It is interesting to see, that the law of the land in these countries provides organic farmers with legal instruments that in a first step of analysis appear favorable to their cause to prevent influx of genetic modification into their cultures and a high level of self-interest in growers of transgenetic crops to prevent genetic modification in competing organic cultures in the vicinity of their own crops.

### **(3) LIABILITY BASED NOT ON FAULT BUT ON CAUSALITY: BURDEN OF PROOF**

It is helpful to see, how German neighborhood law deals with conflicts emerging between growers of transgenetic crops and farmers with vulnerable organic crops to better understand, what the practical daily burden of an organic grower is, who would wish to use these legal instruments to his advantage. § 906 German Civil Code provides for liability not based on prior misconduct, but on mere causality, for damage caused by imponderables such as transgenetic pollen when these emanate from one piece of land and when they cause damage on another piece of land such as in an organic crop cultivation. Organic farmers are entitled to ask for such compensation when they prove the causal nexus between the transgenetic cultures in their neighborhood and a loss of market value of their harvest due to the presence of genetic modifications in their products. However, organic farmers will as a rule in a first step seek a termination order, which prohibits the intrusion of transgenetic pollen onto their crops.

*German Civil Code: Bürgerliches Gesetzbuch (BGB)*

§ 903. [Powers of the owner]

*The owner of an object may, to the extent that this not in violation of the law or the rights of third parties, deal with the object as he pleases and exclude others from any interference. ...*

§ 906. [Interference by imponderables]

*(1) The owner of a piece of land is not entitled to prohibit the intrusion of gases, vapors, odors, smoke, soot, heat, noise, vibrations or similar interference emanating from another piece of land, in so far as the interference will not impede or only insignificantly impede the use of his piece of land. An insignificant impediment is as a rule present, when trigger or target levels fixed in parliamentary statutes or executive norms measured and evaluated in accordance to these rules are not exceeded.*

*The same applies for levels in general administrative rules, which have been enacted in accordance to § 48 of the Federal Emission Protection Law and which document best technical practice.*

*(2) The same applies in so far, as a significant impediment has been caused by a use of the other piece of land in conformity with local usage and in so far as it cannot be avoided by measures, which are reasonably to be expected from users of this kind from an economic point of view. If accordingly*

*the owner has to endure the interference, he may demand an appropriate compensation in money from the user of the other piece of land, if the interference impedes the use of his piece of land in line with local usage or its earnings beyond a proportionate degree."*

**§ 906 (1) German Civil Code allows the grower of transgenetic crops as the user of the emitting property to avoid a termination order by demonstrating that the interference by transgenetic pollen, emitted into a neighboring organic culture did not constitute a significant restriction of the use of the property of the organic neighbor. If, on the contrary, the organic farmer is able to show, that such transgenetic pollen intrusion could cause a significant loss of revenues, the termination of the interference is to be ordered, if not the grower of the transgenetic crop, the defendant, shows, that the interference arises from a use of his property that is in accordance to common local usage at that location and that it cannot be avoided by measures which are economically reasonable for a user of his kind. If the grower of the transgenetic crop demonstrates, that such crop has been admitted to general farm production and that no specific local restrictions, such a natural protection area with respective requirements, apply, the transgenetic crop is likely to be considered in accordance to local usage. The transgenetic farmer will avoid termination of the interference, by showing, that he applied all measures which can economically be expected from a user of his kind. If the grower of transgenetic crop as a defendant avoids a termination order by satisfying his burden of proof, the organic farmer has the right to obtain compensation. This requires the organic farmer to establish that the interference significantly impairs the use of his property and his earnings from the property above a level, which he can be reasonably expected to bear.**

**If the organic farmer seeks a termination order, he has the burden to prove an impediment of the use of his property (by a loss of market value of his crop due to genetic modifications), and he has the burden of proof for the emission of transgenetic pollen from the neighbor's crop and a clear causal link between both. If the organic grower succeeds with this proof, the grower of the transgenetic crop in order to defend himself against a termination order has the burden of proof for the insignificance of the impediment, the being in accordance to local usage and the impossibility to avoid the impediment by economically feasible measures.**

**If the organic farmer then in response to being forced to suffer the intrusion by transgenetic pollen seeks compensation, he has to prove, that he uses his property in accordance to local usage and that he suffers from the emission in a degree, which is above a disadvantage, which he can be reasonably expected to bear without compensation. § 906 German Civil Court makes no reference to fault on the part of the defendant. A compensation payment is required from the owner of a transgenetic crop, if an emission from this crop causes a significant loss of market value in an organic farm production. This compensation is due even where the grower of a transgenetic crop has no means to avoid genetic contamination of an organic crop besides by not growing GMOs.**

#### **(4) NEIGHBORHOOD COMMUNITY RELATIONSHIP (*nachbarschaftliches Gemeinschaftsverhältnis*)**

**The Federal Court (Bundesgerichtshof, highest civil court in Germany, distinct from the German Federal Constitutional Court, both in Karlsruhe) has developed finely balanced criteria in cases brought under § 906 German Civil**

Court with respect to the mutual obligations of neighbors concerning intrusions emanating from one piece of land into another. Since fault does not play any role in the application of § 906 BGB the court uses the concept of a "nachbarrechtliches Gemeinschaftsverhältnis" (*neighborhood community relationship*). The Bundesgerichtshof employs this principle as a barrier for unreasonable claims between neighbors. The court expects neighbors to mutually respect their interests. It requires neighbors to do the utmost possible, to avoid conflicts by adjusting once own a practices to possible emanations to be expected by a reasonable use of ones neighbors property. In accordance to this case law, an organic farmer may not allow himself to be hurt by the emanations of neighboring transgenetic cultures by just simply observe the arising conflict ("sehenden Auges"), and ask for a *de post facto* destruction of the transgenetic culture or for his compensation, if he did not previously seek to avoid such infringement. The German legal frame work offers organic farmers causality damage protection, but it requires them to actively minimize the risk. Taking to account the frame work provided by § 906 German Civil Code and the case law of the German Federal Civil Court which suggests far reaching obligations to mutually respect neighboring interests, the following measures may be expected from organic farmers as a complement for the far-reaching causality liability of their conventional neighbors.

#### **(5) NECESSITY TO ESTABLISH CAUSALITY BETWEEN NEIGHBORING TRANSGENETIC CROP AND GENETIC MODIFICATION IN ORGANIC CROP WOULD FORCE ORGANIC FARMERS INTO PAINSTAKING DOCUMENTATION AND TESTING**

To benefit from the legal protection § 906 BGB offers to them, German organic farmers will seek to demonstrate, that the avoidance of the intrusion of transgenetic pollen into their cultures can be achieved by measures to be taken by their neighbors, who grow transgenetic culture, which are economically feasible for operators of that kind. Also organic growers will seek to prove, that certain isolation distances are sufficient to avoid the contamination of their cultures and that growers of transgenetic crops can reasonably expected to bear the economic disadvantage of such isolation distance. The same may apply to physical barriers, where they might avoid the emission of transgenetic pollen, such as wind brakes or hedge rows. Whether they seek a termination order or whether they ask for compensation, organic farmers have to prove the causal link between the neighboring transgenetic crop and the presence of genetic modifications in their organic harvest. One of the defenses to be expected by the conventional neighbor will be, that the genetic modification detected in the organic production has been caused not by an emission from the neighbor, but introduced already in the seeds. The organic grower will respectively seek to show that the seeds did not contained respective contamination. It will be a common defense of the grower of transgenetic cultures, that there are other sources of the genetic modification in organic crops besides the transgenetic pollen emitted from their fields, such as unclean planting equipment. Transgenetic growers are likely to defend themselves against compensation requests arguing, that contamination occurred after harvest. To establish causality organic growers will need to have their seeds tested and their crop before harvest. The cost of such testing are likely to be reimbursed to organic growers by their conventional neighbors under § 906 (2) German Civil Code.

## **(6) SYSTEM OF ORGANIC FARMERS RESPONSE IN THE FRAMEWORK OF CAUSALITY LIABILITY OF THE OWNERS OF NEIGHBORING TRANSGENETIC CULTIVATION:**

**To use causality liability as a means to defend organic farmers requires them to document all interfaces and the genetic free status of their seeds, their equipment and their crop in all steps of their production to avoid failure in the demonstration of the causal link between transgenic crops grown in neighboring conventional cultures and their own vulnerable organic crop.**

### ® Documentation of the absence of genetic modification in their seeds.

Prior to planting the absence of genetic modification in the seeds used must be verified. Respective assurances from the sources of seeds introduced into an organic farm should be obtained. For all seeds used laboratory analysis have been obtained, either by suppliers or by tests performed after the delivery of seeds, but before planting. The assurances and analysis must cover all genetic modification, which can reasonably be expected to be of relevance in the neighborhood relationship.

### ® Documentation of the absence of GMO in the equipment used.

This applies with utmost relevance for rented equipment and equipment provided for by custom operators. Organic farmers must identify all pieces of the equipment, which need to be cleaned after prior use in non-organic-fields and they will need to keep detail documentation of such cleaning.

### ® Documentation of all genetic modifications on the market,

which may be relevant and to determine the scope of assurances and analysis to be required. Information should be gathered from the neighbors on what transgenic crops are to be expected. The data must comprise an identification of the GMO-varieties in order to ascertain, that seeds used by the organic farmer do not show any traces of respective genetic modifications.

### ® Documentation of efforts to remove organic crop from the neighborhood to transgenic crop production.

Besides requiring neighbors to communicate the type of genetic modification they will use in their crops, the location of their transgenic fields ought to be determined to allow for a withdrawal of organic crops, which may suffer from termination, to areas of the organic farm in a reasonably safe distance (defensive organic crop planning).

### ® Documentation of efforts to develop defensive organic planting date planning.

It may also be feasible to identify the planting dates for the transgenic crops in order to plan the planting dates for organic crops to minimize the period time of common pollination (defensive organic crop planning).

### ® Documentation of efforts to develop organic defensive crop rotation.

When an organic farmer is informed about transgenic crops in his neighborhood, he will consequently develop a crop protection plan, that avoids the introduction of genetic modification into his cultures. He may choose where economically reasonable non-vulnerable alternatives (defensive organic crop rotation)

### ® Documentation of information to conventional neighbors to prove efforts to force them to minimize risks.

To be on the safe side, the organic grower will publish not only the precise field margins of his organic lots, but also the use he intends in the next growing season reasonably early to allow his neighbors to adjust their crop planning in order to set incentives for their crop planning (protective crop planning). He will make sure, that he informs all farmers who farm adjoining fields, be it on their own land or rented land.

® Documentation of efforts to negotiate a system of mutual tolerance (negative zipper crop rotation).

Organic farmers will ask their conventional neighbors to agree on long-term crop rotation planning which is mutually protective (negative zipper crop rotation), since conventional transgenetic crop never faces vulnerable organic culture.

® Documentation of GMO modification in crop prior to harvest

Field samples should be submitted to testing for the presence of genetic modifications prior to harvest. If contamination is likely, samples should be collected along step by step pattern, going from areas most closed to the transgenetic neighboring fields with a highest risk to areas with lower risk, in order to establish a pattern of causality. Samples should be drawn by objective third parties. Drawing and the handling of samples should be carefully documented to avoid a claim of biased testing and laboratory procedures. A proof of each sample should be stored by an objective third party.

® Documentation of after harvest contamination protection.

After harvest handling should avoid any contamination sources. Dust from transgenetic crops may contaminate organic crops. Storage units should very carefully be separated. Grain dryers, rotary screeners and any other equipment should be exclusively used for organic harvest. The same applies to trucks, trailers and shipping containers. If dual use cannot be avoided or if simple use for organic staffs is not clearly documented, equipment used must be carefully cleaned and free of grain, dust or other materials. Such assurance and cleaning must be documented.

® Documentation of market prices for organic non-GMO-crop.

Records are be carefully kept including buying offers and records of organic sales in order to help to establish claims for loses, should contamination occur.

**Causality liability can be used to defend organic farmers, but the its expanded use may result in a war that puts organic farmers against their conventional neighbors in a "bellum omnium contra omnes" as in Hobbes's Leviathan. It may be that there will be a period of transition in which organic farmers will have to fight using causality liability towards their conventional neighbors. But this causes unfair disruption in rural communities. Consequently it should rather be the industry which introduces GMO-seeds into agricultural production which should carry the administrative and pecuniary burden of the neighborhood conflicts of these crops with organic farmers. This, however, necessitates the introduction of administrative structures by the producers of transgenetic seeds to minimize genetic pollution and to compensate all organic farmers, traders and processors who suffered from any genetic contamination.**

**END**

**10.03.2002**