Comments on:

Draft Amendments to Regulations to the Consumer Protection Act related to labelling of Genetically Modified Organisms

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PO Box 29170 Melville 2109, Gauteng, South Africa
+27 (0)11 486 1156, http://www.acbio.org.za

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Introduction

The African Centre for Biosafety (ACB) welcomes the publication of amendments to the Regulations to the Consumer Protection Act (CPA) related to labelling of Genetically Modified Organisms. We congratulate the Minister of Trade and Industry for these amendments, which bring clarity to the legislation and require that all goods containing genetically modified (GM) ingredients or components be labelled, thus enabling consumers to make informed choices. We note with concern that even though labels will now appear on a wide array of products, consumers for whom maize is a staple have no choice but to eat GM maize, as an alternative GM free maize market is not available. Nonetheless, we welcome the transparency that the new labelling regime will bring, and the opportunity that this affords for a dialogue between consumers, food producers and farmers.

The ACB has fully participated in the consultation processes convened and organised by the Department of Trade and Industry (DTI) to date, made written and oral submissions, and shared our comprehensive study on the issue, titled 'Traceability, Segregation and Labelling of Genetically Modified Products in South Africa: A Position paper on the implementation of the Consumer Protection Act and mandatory labelling of GM food'. In addition, we submitted comments to the initial regulations. We offer these comments in good faith with the aim of contributing to the drafting of robust and rigorous laws that protect the rights of consumers, in accordance with the principles and imperatives underpinning the Consumer Protection Act and our Constitution.

Summary of concerns and recommendations:

- We note that the Consumer Protection Act is clear that it is the **ingredients** of products that must be labelled in terms of GM and therefore, if an ingredient contains 5% or more GM content, it must be labelled as "containing genetically modified ingredients".
- We advise that the regulations already provide a legally sound description of "prescribed goods" in regulation (3) and that no further action needs to be taken by the Minister in this regard.
- We are concerned that unless there is monitoring and enforcement of the law, producers will unlawfully label products "may contain GM", especially in circumstances where they know the foodstuff to contain GM components or ingredients, taking into account that almost 80% of all maize grown and 98% of all soya grown in SA is GM. In this regard, we strongly recommend that the wording "or not feasible" in the draft regulation (8) be deleted as it is unclear what the definition of feasible is.

- We assert that a 5% threshold triggering positive GM labelling is misleading and confusing to consumers and therefore does not implement the stated objectives of the CPA. We recommend that the threshold should be set at 0.9% as this is the internationally accepted level and what our food exporters comply with, when exporting processed maize products especially to the EU.
- We note that the Codex Alimentarius has highlighted the need for further research to be carried out on the potential allergernicity of GMOs. As there is scientific uncertainty on this issue, consumers need to be aware of any trace of GMOs in food products. In this case, a threshold of 5% is not good enough; even a threshold of 0.9% is problematic in terms of possible allergens. For this reason, we recommend that a "process-based" labelling system of labelling should be considered instead of a "content-based" system.
- We note that food companies are already required to label their products to provide consumer information and choice. GM labelling is no different and its implementation will not significantly impact on the cost of food.

1. Scope

Section 24(6) of the Consumer Protection Act, 2008 (CPA) stipulates that

> "any person who produces, supplies, imports or packages any prescribed goods must display on, or in association with the packaging of those goods, a notice in the prescribed manner and form that discloses the presence of any genetically modified ingredients or components of those goods in accordance with applicable regulations"

1.1 The prescription is clearly that the ingredients or components of the product need to be labelled in terms of their GM content. Read with regulation (3), it is prescribed that any ingredient or component containing 5% or more GM content must be labelled as "contains genetically modified ingredients", regardless of the percentage of that ingredient in the make-up of the entire product.

1.2 **Prescribed goods**

According to Section 24(6) the requirement that a notice (disclosing the presence of any GMO ingredients or components of those goods) must be displayed on or in association with the packaging of those goods is dependent on the goods being 'prescribed goods'.

The term 'prescribed' is defined in the CPA as meaning 'determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation made, or notice given, by the Minister in terms of this Act.'

Section 24(4) provides the Minister with the discretionary statutory power to prescribe such goods, and in particular provides that the Minister may prescribe:

(a) categories of goods that are required to have a trade description applied to them, as contemplated in subsection (5);[1]

(b) the rules to be used in accordance with any international agreement for the purpose of determining the country of origin of any goods or components of any goods; and

(c) the information that is required to be included in any trade description, from among the categories of information contemplated in the definition of "trade description" in section 1.

In light of the above, the Minister has the statutory power to prescribe by regulation or notice (in the *Gazette*) both the goods that are subject to the notice requirements set out in section 24(6) of the CPA, as well as the manner and form of the notice.

In terms of the draft amendment of the Regulations (Product Labelling and Trade Descriptions: Genetically Modified Organisms), the Minister stipulates (prescribes) that the regulation applies to all goods that contain at least five % of genetically modified ingredients or components, irrespective of whether such manufacturing occurred in the Republic or elsewhere, and to marketing material in respect of such goods. On the face of it, this prescription of the category of goods that the notice requirements apply to is *intra vires* and lawful.

[1] Section 24(5) stipulates that the producer or importer of any goods that have been prescribed in terms of subsection (4) must apply a trade description to those goods, disclosing: (a) the country of origin of the goods; and (*b*) any other prescribed information. The term **'trade description'** is defined in s1 of the CPA as meaning: (a) any description, statement or other direct or indirect indication, other than a trade mark, as to… (iii) the ingredients of which any goods consist, or material of which any goods are made;… (v) the mode of manufacturing or producing any goods etc. The term **'goods'** is defined in the CPA as including, amongst other things, anything marketed for human consumption.

2. Comments on amended regulations

2.1 (a) Amendment of regulation (2)

> "This regulation applies to all goods that contain genetically modified ingredients or components"

We welcome this amendment.

2.2 (b) Amendment of regulation (3)

> "For the purposes of section 24(6) of the Act, and subject to subregulation (4) and (6), this regulation applies to all goods that contain genetically modified ingredients or components which contain at least 5 percent of genetically modified [organisms] ingredients or components, irrespective of whether such manufacturing occurred in the Republic or elsewhere, and to marketing material in respect of such good.

Comments:

2.2.1 We are pleased that GM labels are now clearly mandatory for GMOs as well as processed foods containing GM content.

2.2.2 As already dealt with in our comments regarding the scope of these regulations, we reiterate that it is ingredients that are labelled GM, and as such, if an ingredient or component contains 5% or more GM content, the label must reflect that the good "contains genetically modified ingredients/components".

2.2.3 We are concerned that labelling is only triggered where there is 5% or more GM content. This has no scientific basis, is misleading to consumers and is inconsistent with the threshold set by the DTI for the export of goods. In addition, there remains scientific uncertainty about the possible allergernicity of GMOs, in which case consumers must be alerted to any trace of GM content. We recommend that a positive GM label should be triggered at 0.9% as GM content is detectable at this level, is consistent with the threshold level set for exports and provides accurate and meaningful information for consumers.

2.2.3.1 A 5% threshold is misleading to consumers

Article 24(2) of the Consumer Protection Act States that:

"a person must not (a) knowingly apply to any goods a trade description that is likely to mislead the consumer as to any matter implied or expressed in that trade description".

Regulation (6) prescribes that a good or ingredient or component containing less than 1% can be labelled “not genetically modified”. Therefore, any good containing more than 1% is not legally considered to be “not GM”. However, products only trigger a positive label when they contain 5% or more GM content. Products that contain between 1 and 5% GM content do not need to be labelled as containing GM, despite the fact that this content is scientifically detectable and that the good may not be defined as not containing GM in terms of the regulations. The absence of a positive GM label misleads consumers into believing that such products do not contain detectable GM ingredients or components, when in fact they do.

2.2.3.2 A 5% threshold is inconsistent with measures set for exports

A threshold of 5% is unnecessarily and unreasonably high, sanctioning high levels of contamination. It is inconsistent with the threshold set by the Department of Agriculture for export shipments with non-GM status, which is set at 0.9%[i]. We ask why one standard and system is set for export and a another is set for local citizens. Setting up a single system for domestic and export purposes makes practical sense. We bring to your attention that a threshold of 0.9% is recommended in the African Model Law on Biosafety. The African Union urged all member States to use the Model Law as a basis for drafting their national legal instruments related to biosafety[ii].

2.2.3.3 Potential allergernicity of GMOs needs to be considered

One of the most frequently posed questions regarding the safety of GM foods is in relation to the possibility of introducing new allergens to the food supply. For this reason, the Codex Alimentarius convened an expert task team to address GMOs and allergernicity. The task team developed a decision making model to assist in allergenicity risk assessment. The team concluded that while the decision-making model improved risk assessment procedures, “due to the wide genetic variability in the human population and different geographical dietary intake, further evaluation for adverse effects of the genetically modified food should be considered once the product has reached the market”[iii]. They found that further research into allergernicity is still needed and that “further studies are needed to determine the amount of allergen that sensitises and elicits allergic events”[iv]. With regard to allergies in general, they noted that "Severe reactions can take place after intake of minute amounts of the offending food, and a safe threshold level below which reaction will not occur has not been defined”[v]. They noted that people suffering from allergies deal with the problem through the strict adherence of avoidance diets.

South Africa is the only country in the world that has allowed the genetic modification of its staple food. Millions of South Africans are eating GM maize daily, in a semi- processed form. This is unheard of anywhere else in the world. In order to assist in properly monitoring the impact of consuming GM foods and also to allow individuals that may have developed an allergic response to such foods to avoid them, it would be wise to follow the example of the European Union, Brazil and China and implement a "process-based" labelling system instead of a "content-based" system. This system is not based on the detection of GM content in the final product, but rather relies on a credible paper trail through the food chain, alerting each player in the chain of GM processes or content in a product. Labelling can then cover a range of products, including processed products such as starch, high fructose corn syrup and highly refined oils irrespective of whether there is traceable transgenic DNA[vi].Various levels of stringency can be applied in this regard, for example, GM labelling could be required only if "GM ingredients are directly present in the final product (e.g. GM maize), or they could be required if any GM processes were employed at any stage in production (e.g. milk from animals fed with GM grains, or the use of GM micro-organisms in the process of producing an additive which does not in itself have GM content)"[vii].

The recently promulgated R146 on Regulations relating to the Labelling and Advertising of Foodstuffs, under the Foodstuffs, Cosmetics and Disinfectants Act (1972,) makes the labelling of potential allergens a compulsory requirement irrespective of the amount present in the product[viii].

2.3 (c) Amendment of regulation (4)

> "Any good [or ingredient or component] to which subregulation (3) applies may not be produced, supplied, imported or packaged unless a notice meeting the requirements of section 22 of the Act is [applied to such good or marketing material, as the case may be] displayed on, or in association with the packaging of those goods in a conspicuous and easily legible manner and size stating, without change, that the good [or ingredient or component] contains genetically modified [organisms] ingredients or components"

We welcome this amendment.

2.4 (d) Amendment of regulation (6)

> "A notice meeting the requirements of Section 22 of the Act must not state that a good [or ingredient or component] does not contain genetically modified [organisms] ingredients or components unless such good [or ingredient or component] contains less than one percent genetically modified [organisms] ingredients or components"

2.4.1 There is inconsistency in what may and may not be labelled as containing GM content. If those wishing to label NOT GM can test at 0.9%, there is no reason that those who are required to label as CONTAINING GM content should not be required to do so at 0.9%.

2.5 (e) Amendment of regulation (7)

"Notwithstanding the provisions of subregulation 7(6), a notice meeting the requirements of section 22 may state that the level of genetically modified [organisms] ingredients or components contained in the good [ingredient or component] to which sub-regulation (2) applies is less than 5 per cent"

2.5.1 Yet again, we strongly hold that a mandatory positive GM label should be triggered at a threshold of more than 0.9% GM content. The current legislation is misleading and untruthful and will lead to confusion.

2.6 (f) Amendment of regulation (8)

"If it is scientifically impractical or not feasible to test goods contemplated in subregulation (2) for the presence of genetically modified [organisms or] ingredients or components, a notice meeting the requirements of section 22 of the Act must be [applied to such goods or marketing material, as the case may be,] displayed on, or in association with the packaging of those goods in a conspicuous and easily legible manner and size, stating "May contain genetically modified ingredients or components".

2.6.1 We are concerned that producers will unlawfully use the "may contain" label in instances where it is feasible and scientifically practical to test for the presence of GM organisms, ingredients or components. Such labels will be unlawful and meaningless to consumers and careful monitoring and enforcement will be needed to avoid such labelling. Currently, at least 77% of maize cultivated in South Africa, and almost 98% soya cultivated in South Africa, is genetically modified. As such, producers can be quite certain that products derived from these crops are GM and even in highly processed foods, GM DNA can be detected. See below a small sample of maize products currently on the market that display GM labels. It is very likely that these contain more than 5% GM content and that it is scientifically practical and feasible to test them.

Sample of maize products currently displaying GM labelling - it is highly likely that these products contain over 5% GM content

Brand	Product	Label	Date
Tiger Brands	Champion	Produced using GM on 1kg bags	12/07/2012
Sasko	White Star	Produced using GM, not displayed on 10kg	12/07/20102
premier Foods	Iwisa No 1 Super	May contain GMO	12/07/2012
Tiger Brands	Premier Coarse Braaipap	May contain GMO	12/07/2012
Tiger Brands	Induna Special Maize	May contain GMO	20/07/2012
Sasko	Induna Fine Maize	May contain GMO	20/07/2012
tiger Brands	Ace Super	May contain GMO	12/07/2013
Woolworths	Ace Braaipap	May contain GMO	12/07/2014
	Super Maize Meal	Produced using GM	20/07/2012

2.6.2 The definition of "not feasible" is unclear. Does it relate to the particular physical or financial constraints of any given producer? This lack of clarity creates a loophole in the regulations that could lead to our shelves being swamped with "may contain" labels, thus undermining the consumer's right to accurate and meaningful information. We recommend that the words "or not feasible" be deleted from this sub regulation.

2.7 (g)Amendment of regulation (9)

"This regulation does not amend or repeal or detract from any other regulation applying to product labelling and trade descriptions of goods derived from genetically modified organisms made under or in terms of any other legislation, nor do any such regulations detract from or prejudice this regulation"

We welcome this amendment

3. Costs of labelling

There have been several media reports over the past year claiming that GM labelling will drive up food prices for consumers. Professor Viljoen, Director of the GMO Testing Facility at the University of the Free State, which provides diagnostic detection and quantification of GMOs in grain and processed foods for the food industry for the region, disputes this. Professor Viljoen has published several research papers on GM testing and labelling and is an expert advisor to the Codex Alimentarius on GM related matters. In a letter to the Business Day on 3 February 2011, Professor

Viljoen claimed that "any contention that testing is unreasonably burdensome and costly is pure nonsense"[ix]. In his explanation he points out the following:

- The percentage of GM content, whether 1% or 5% makes no difference to the cost of testing.
- Companies may assume that ingredients derived from soy or maize in South Africa will contain a high percentage of GM content and will therefore not have to test and will incur no extra cost.
- Those that want to label their product as not containing GM content will have to test at their own cost. This is no different to the current status quo.
- Food producers already have to label additives, colourants, etc. and there is no reported increase in food costs from this practice. GM labeling is no different.

Professor Viljoen also pointed to other countries in the world that have already implemented much more stringent labelling regimes than the proposed South African legislation, without significant impact on food costs. For example, he notes that, "In a comprehensive study in the European Union (EU) it was estimated that the added cost to food of genetic modification labelling ranged from 0,01% to 0,17%, depending on the stringency required. The EU system for genetic modification labelling is considerably more stringent than in SA and from this it is reasonable to suggest that the labelling cost to food would be much lower in SA".

We recommend that the Department of Trade and Industry consult with Professor Viljoen on the necessary processes and related costs that are entailed in ensuring meaningful and accurate labelling in South Africa, thereby ensuring that the legislation is based on fact.
He can be contacted at +27 (0) 51 405 3656 Email: viljoencd@ufs.ac.za.

Conclusion

The ACB is pleased that the Department of Trade and Industry has made it clear to food producers that all goods containing GM content must now be labeled. Consumers now have a right to choose according to their needs and wishes. We are concerned about the high threshold that has been set for labeling GM content and assert that this is misleading and confusing to consumers. In cases of allergic reaction to GMOs, it is necessary for consumers to know of any trace elements in goods that they consume. We appeal to the Department of Trade and Industry to monitor and enforce these regulations, especially with regard to the "May contain" label, as unlawfully employing this label will undermine consumer rights. Lastly, we do not believe there are any grounds to claim that labeling of GM foods will increase food costs, current research and expert advice do not support such a claim.

REFERENCES:

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[ii] African Union. **Decision EX/CL/Dec.26(III)**

[iii] FAO/WHO. 2001 **Evaluation of Allergenicity of Genetically Modified Foods. Report of a Joint FAO/WHO Expert Consultation on Allergenicity of Food Derived from Biotechnology**. 22-25 January 2001. ftp://ftp.fao.org/es/esn/food/allergygm.pdf accessed 27 October

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[vii] Gruere G.P, and Rao, S.R. 2007 **A Review of International Labeling Policies of Genetically Modified Food to Evaluate India's Proposed Rule**. AgbioForum, 10(1):51-64 http://agbioforum.org/v10n1/v10n1a06-gruere.htm accessed 5 November 2012

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