African Centre for Biosafety (ACB)

Comments on:

Regulations to the Consumer Protection Act related to labelling of Genetically Modified Organisms: Regulation 9.1 for the purposes of Section 24(6)

Contact Mariam Mayet: Tel: 011 486-2701 Fax: 011 486-1156

email mariammayet@mweb.co.za

Table of Contents

Introduction

The African Centre for Biosafety (ACB) welcomes the opportunity to comment on the draft regulations relating to the labelling of food containing or derived from genetically modified organisms (section 9.1.) 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*[i] on the implementation of the Consumer Protection Act and mandatory labelling of GM food'. 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.

Background

The United States began growing genetically modified (GM) crops in 1996 and is still the major global producer of these controversial crops[ii]. GM crops are not the norm in agriculture - only 2.7% of global agricultural land is planted to GM crops, with the majority being grown in the United States, Brazil and Argentina. Together, these three countries accounted for 79.6% of the GM crops grown globally in 2009.[iii] As an economic superpower, the United States has foisted GM foods onto unsuspecting consumers around the world and these foods have been dogged by deep controversy and consumer resistance. Many countries have introduced labelling regimes in response to demands from citizens to have the right to know and to choose to avoid eating GM food.

An indication of the controversy surrounding these crops and resultant food products is the inability of the Codex Alimentarius Commission, a global food standards body, to reach consensus on GM labelling after more than 10 years of work by the Committee on Food Labelling[iv]. The tension between powerful countries trading in genetically modified agro-commodities (which seek weak laws) and countries intent on protecting consumer rights (which seek the most stringent legislation) has led to a deadlock. The Biotechnology Industry Organisation (BIO) argues that, since consensus cannot be reached, all work on "labelling of food derived from modern biotechnology" should be discontinued at Codex[v]. It is clear from this that industry does not want any international agreement on labelling, however weak.

However, over the last decade at least 40 countries have adopted labelling regimes[vi] in an effort to protect their consumer's right to choose what they eat and what food production systems they are willing to support with their hard earned cash. Some of the major differences in these systems include whether:

- they are mandatory or voluntary;
- they label detectable traces of genetically modified DNA in the final product or set up traceability systems to track products resulting from genetically modified processes or crops through the food chain; and
- what threshold level they set for adventitious presence of GMO's in the food chain, ranging from 0.9 – 5% (except in the case of China which has set no threshold). [vii]

The European Union is regarded as having set the benchmark for a stringent labelling regime that ensures consumers have access to meaningful and accurate information, affording them the right to choose what they eat based on ethical, religious, health or other concerns. The first regulations, developed in 1997, were strictly product-based, meaning that only detectable DNA in the final product triggered labelling. However, in 2003 they improved their labelling system by moving to a "process based" traceability system of GM food and feed. Labelling now covers 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. Process based labelling is also legally required under Chinese and Brazilian law. [viii]

In addition, European importers have worked hard to set up systems and cleaning machinery to ensure that their 0.9% threshold for adventitious presence is maintained.

Countries that have adopted less stringent regimes, for example setting thresholds for adventitious presence between 3 and 5%, have done so at the behest of the powerful agricultural commodity exporting countries, in particular, the United States. Such a high threshold is to the benefit of these exporters of commodities rather than the consumers to which their produce is delivered.

South Africa is the 8th largest producer of GM crops globally[ix] and genetically modified maize has been on the market since 1999. It is the only country in the world that has allowed the genetic modification of its staple food and remains the only African country to commercialise a GM food crop to date[1]. The trend with genetically modified crops in South Africa has been to take industry's lead and ignore the cautious voice of civil society. Indeed it has taken 12 years of lobbying for meaningful labelling legislation to be put on the table.

GM cotton and soya, yellow and white maize have been commercially released. Genetically modified potatoes were denied a permit for commercial release in 2009 and an appeal is pending on this decision. There are also field trials in progress on GM sugarcane and contained trials on sorghum and cassava. A permit for the import of GM rice is pending, while an application for field trials of GM canola was withdrawn by Monsanto for unknown reasons in 2010.[x] Internationally, GM wheat has become a focus as the wheat genome is unravelled. It is apparent that a wide variety of foods containing GMOs, GM ingredients or ingredients having been produced with transgenic technology could be on the market in the near future in South Africa.

It is important that our labelling regime be clear, forward looking and consumer focused if the aims of the Consumer Protection Act are to be achieved.

[1] Burkina Faso permitted the cultivation of GM cotton in .... Egypt permitted the cultivation of GM maize in .. but withdrew the application due to incomplete legislation regulating the use of GMOs.

Table 1: GMOs approved commercial growing and export

Event	Crop	Trait	Company	Year approv-ed
Bollgard II xRR flex (Mon15985 x Mon 88913)	Cotton	Insect Resistant Herbicide Tolerant	Monsanto	2007
Mon 88913 (RR flex)	Cotton	Herbicide Tolerant	Monsanto	2007
Mon 810 x NK603	Maize	Insect Resistant Herbicide Tolerant	Monsanto	2007
Bollgard RR	Cotton	Insect Resistant Herbicide Tolerant	Monsanto	2005
Bollgard II, line 15985	Cotton	Insect Resistant	Monsanto	2003
Bt 11	Maize	Insect Resistant	Syngenta	2003
NK603	Maize	Herbicide Tolerant	Monsanto	2002
GTS40-3-2	Soybean	Herbicide Tolerant	Monsanto	2001
RR lines 1445 & 1698	Cotton	Herbicide Tolerant	Monsanto	2000
Line 531/Bollgard	Cotton	Insect Resistant	Monsanto	1997
Mon 810/Yieldgard	Maize	Insect Resistant	Monsanto	1997

Use of the event: Importation/exportation, commercial planting, food and/or feed
Source: Genetically Modified Organisms Act, 1997. Annual Report 2008/09

Note: Although Syngenta has obtained approval for its Bt 11 maize, this is not used or sold on the South African market. Thus, all the GMOs on the South African market belong to Monsanto.

Detailed Comments

Regulation 9.1

In this regulation, "genetically modified organism" means a genetically modified organism as defined in section 1 of the Genetically Modified Organisms Act, 1997 (Act No.12 of 1997) and "genetically modified" has a corresponding meaning.

(a) We agree with the definition of 'genetically modified organism' as there has to be congruency with other legislation regulating GMOs in South Africa.

(b) It is not clear what the definition of genetically modified food is. A possible definition: "food and food ingredients composed of or containing genetically modified or engineered organisms or food and food ingredients produced from but not containing genetically modified or engineered organism. This definition comes form the Indian Draft law on labelling of Genetically Modified Food.

Regulation 9.2

For the purposes of sections 24(6) of the Act[2], this regulation applies to all good listed in Annexure B which contain more than 5% of genetically modified organisms, irrespective of whether such making or manufacturing occurred in the Republic or elsewhere, and to marketing material in respect of such goods.

This provision creates the primary responsibility to label, as it is linked directly to the description of 'prescribed goods' as set out in the Annexure B. Thus, this provision has to be most carefully drafted.

(a) The description of "maize, soya and imported canola" in Annexure B is insufficient as it can refer to both approved and unapproved traits of GM maize, soya and imported canola. The South African government acting through the department of agriculture has imposed a zero tolerance for unapproved GMOs. Regulation 9.2 can and should only relate to approved traits GM maize soya and canola. In this regard, the drafter should note that for GM maize, we have several varieties, as set out in the table above, and each individual variety has to be approved on a case-by-case basis. Thus our recommendation is that the word "approved" be inserted as follows in the first

[2] **S 24 (6)**
Any person who produces, supplies, imports or packages any prescribed goods must display on, or in association with the packaging of these 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

sentence **" … this regulation applies to all APPROVED goods listed in Annexure B.**

(b) It is not clear why approved varieties of GM cotton have not been included in Annexure B. South African farmers have been growing GM cotton more several years. In fact close to 100% of our cotton is genetically modified. Cottonseed oil is used in food products such as a preservative for tinned oysters. We recommend that products containing cottonseed oil, whether local or imported need to be labelled as such.

(c) It is unclear why only imported canola oil is listed in Annexure B. It is not unlikely that genetically modified canola could be released in South Africa in the future. This should also be subject to labelling, as should imported soybean oil. In addition, this clause could fall foul of the Trade Barrier and Tariffs agreement under the WTO, which states that foreign products cannot be treated less favourably than their domestic counterparts.

(d) We recommend that imported GM foods should include the wording "approved for marketing and use in the country of origin". Note that the Food Safety Authority of New Zealand (FSANZ) has recently given approval for Monsanto's drought resistant maize MON84760 for food, feed and processing. This same GM event is undergoing field trails in South Africa where no food safety approval has yet been given. Furthermore, the South African GMO regulatory body, the Executive Council, Genetically Modified Organisms Act, has imposed a moratorium on the approval of all new GMO for the purposes of import as direct use as food, feed and processing if the same event has not also been correspondingly approved for commercial use in South Africa.

(e) The goods listed in Annexure B is insufficient as each time new GM food crops/animals are approved by the Department of Agriculture, the regulations will need to be amended. Genetically modified potatoes are currently the subject matter of appeal, and if the Agricultural Research Council is successful, GM potatoes will be placed on the South African market. Furthermore, several experiments are being conducted in South Africa involving Mnandi potatoes, a cultivar popular with small-scale farmers, GM cassava, sorghum and sugarcane. The wording **"or subsequent approvals of genetically modified organisms by the Department of Agriculture under the GMO Act 15 of 1999, as amended"** should be included in Annexure B.

(f) This provision only applies to products that contain GMOs, not products derived from GMOs. However clause 9.4 refers to all goods contemplated in Annexure B **intentionally and directly produced** (through) **genetic modification processes**

and 9.6 refers to genetically modified organisms or **ingredients**. These need to be incorporated here to ensure consistency throughout section 9. Our suggesting wording is, **"all goods that consist of a GMO, contains genetically modified ingredients or derived from genetic modification processes"**. We recommend that wording to the following effect be considered: **"This regulation applies to all GM food, derived there from, whether it is primary or processed or any ingredient of food, food additives, or any food products that may contain GM material without any exception."**

(g) In order to track foodstuffs derived from genetic modification processes, a traceability scheme must be put in place from seed to packaging. Such a scheme would facilitate accurate labelling, monitoring and withdrawal of wrongful products[xi] and assist in the protection of consumer rights as contemplated in section 61.1 of the CPA. This section places liability on producers, importers, distributors and retailers for a) supplying any unsafe goods; b) defect or hazard in any goods; c) inadequate warnings provided to the consumer pertaining to hazard arising from or associated with the use of any goods. Consumers will be able to claim compensation for harm suffered in respect of any such goods supplied after 24 April 2010 if they can prove that the supplier supplied the goods to them and that they suffered harm as a result of using the goods. This means all actors in the value chain can be held liable. Suppliers will not be able to contract out of product liability anymore (McGee, 2010). Retailers must deal with consumer complaints and will not be permitted to refer the consumer to suppliers (Luterek, 2009). Nevertheless, this liability is limited in section 61(4)c which says liability does not arise if "it is unreasonable to expect the distributor or retailer to have discovered the unsafe product characteristic, failure, defect or hazard, having regard to that person's role in marketing the goods to consumers". This means consumers will probably have to make claims against manufacturers or importers rather than retailers or distributors, unless product testing was possible at the retail level (Woker, 2009:10).[xii]

(g) A threshold of 5% is unnecessarily and unreasonably high, sanctioning high levels of contamination and undermining the consumer's right to know. 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%.[xiii] The same 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[xiv].

Drafters should also note that as a Party to the Biosafety Protocol, the South African government must craft new Regulations to give effect to the agreement reached at COP MOP3 in respect to Article 18(2)(a) of the Protocol. These Regulations would be required thus to deal with the following:

(i) testing of a mixture of GMOs in order to determine not only the GMO content

but also the individual variety (genetic transformation event) of GMOs contained in the shipment, to list the GMOs and ascertain that it has been approved for import;
(ii) ensuring that non-GM shipments only contain GMOs that are technically unavoidable (mostly, where non-GM crops/food have become contaminated by GMOs) and that a threshold is set for such unavoidable quantities (e.g. 1%);
(iii) protecting the integrity of non-GMO shipments from contamination;
(iv) ensuring that there is zero tolerance for unapproved GMOs; and
(v) developing modalities for sampling and detection techniques.

(h) It is not clear exactly what the threshold applies to. Is it 5% of the entire food or product or does it apply to the genetically modified constituents? It is recommended that the threshold should apply to each of the ingredients, i.e. if there is GM presence over % of agreed threshold in any of the single ingredients the labelling is triggered. In other words, if any of the constituent components of the food produced by or derived from a GMO contains more than the agreed threshold, the entire food should be labelled. A bag of potato chips should be labeled indicating that the oil used in frying the chips is GM if the oil in question has been derived from a GMO. Moreover, such labelling should apply irrespective of whether detectable DNA is present in such oil.

It should be noted that our major export partners (EU) have set the threshold for adventitious presence at 0.9%. It is recommended that South Africa set one consistent threshold for domestic and international trade and develop a single Identity Preservation (IP) system in the country. In addition, the recommended threshold set by the African Model Law on Biosafety, which sets out guidelines for African countries in the development of their National Biosafety Frameworks is 0.9%.

Countries that have adopted 3-5% thresholds to date are those that import high volumes of genetically modified commodities and have been pressurised by the United States to adopt this stance. Countries where labelling legislation is clearly intended to cater for consumer rather than industry needs have applied the more stringent threshold of 0.9%. We question why South Africa is setting one standard for the European market and another for its own citizens.

Regulation 9.3

Any goods to which subregulation (2) applies may not be produced, supplied, imported, exported, packaged, sold, distributed or marketed unless a notice meeting the requirements of section 22 of the Act is applied to such goods or marketing material, as the case may be, in a conspicuous and easily legible manner and size stating, without change that the goods "Contain at least 5% of genetically modified organisms."

(a) It is not necessary that the label state that goods contain at least 5% genetically modified organisms. Once a threshold level has been agreed to, this then becomes the trigger for labelling and the label should read plainly, **This food contains GMOs**.

Regulation 9.4

If goods listed or contemplated in Annexure B are intentionally and directly produced genetic modification processes, the goods or marketing material, as the case may be, must be labelled, meeting the requirements of Section 22 of the Act, without change as "Produced using Genetic Modification"

We welcome this provision and believe it should be retained.

Regulation 9.5

A notice meeting section 22 of the Act stating "Genetically modified content is below 5%" may be applied to goods listed as contemplated in Annexure B if less then 5% and the ingredients and components from which it is made or manufactured consist of a genetically modified organism.

We are not sure what the rationale is for this voluntary labelling provision. Interestingly, this provision does convey to the general public that it is indeed possible to label GM food containing less than 5%!!

Regulation 9.6

If it is impossible or not feasible to test goods listed or contemplated in Annexure B for the presence of genetically modified organisms or ingredients, 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, in a conspicuous and easily legible manner and size, must be labelled "May contain genetically modified ingredients"

(a) This clause enables industry to easily avoid providing for meaningful labelling by claiming that it was impossible or not feasible to test goods and will lead to "may contain" labels. This defies the point of labelling as it does not supply the consumer with meaningful and accurate labelling.
The wording is imprecise: who will decide what is feasible and what is not? May contain labels are vague, misleading and unscientific. The 'may contain' label has a long history of contention particularly in international negotiations where industry has fought hard to introduce this into the resolution of Article 18 of the Biosafety Protocol

because it does not want any impediment on its free and unfettered trade.

(b) Testing is one system of identifying foods that contain genetically modified DNA, but should be supplemented by a vigorous Identity Preservation system that creates a paper trail from seed to packaging/farm to fork. At each node in the food chain, this paper trail should serve to inform of the status of the product. [xxxx traceability systems in SA..] In addition, many food producers have set up their own identity preservation systems to suit the peculiarities of their clientele.

Conclusion

While we welcome the opportunity that GM food may be labelled, after more than 10 years of keeping the consumer in the dark, we are concerned that the current regulations are not consistent with the intention, spirit and principles of the Consumer Protection Act. A greater effort must be made to providing greater clarity in the legislation, avoiding anomalies and vague drafting, providing a consistent stringent threshold and close all loopholes.

[i] See http://www.biosafetyafrica.org.za/index.php/20100512307/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/menu-id-100026.html
[ii] USDA Economic Research Service http://www.ers.usda.gov/Data/BiotechCrops/ accessed 25 January 2011
[iii] Jishnu, L. 1 March 2010. **Global spread of GM crops saw setback last year**. Business Standard New Delhi. http://www.businessstandard.com/india/news/global-spreadgm-crops-saw-setback-last-year/387177/ (accessed 25 January 2011)
[iv] African Centre for Biosafety. 2010. 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. http://www.biosafetyafrica.org.za/index.php/20100512307/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/menu-id-100026.html
[v] ibid
[vi] 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
[vii] ibid
[viii] A short history of labelling. http://www.genewatch.org/uploads/f03c6d66a9b354535738483c1c3d49e4/A_Short_History_of_Labelling.pdf
[ix] James, C. 2009. **Global Status of Commercialized Biotech/GM Crops:2009**. ISAAA Brief No. 41. ISAAA
[x] Drawn from GM Permits Information. www.daff.gov.za
[xi] African Centre for Biosafety. 2010. 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. http://www.biosafetyafrica.org.za/index.php/20100512307/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/menu-id-100026.html
[xii] ibid
[xiii] ibid
[xiv] African Union. Decision EX/CL/Dec.26(III)