Comments on the European Commission's notification pursuant to Article 95, paragraph 5 of the EC Treaty, concerning the Polish draft Act on Genetically Modified Organisms.

Ludwig Krämer, Professor on EU Environmental Law

1. The draft Polish legislation only intends to introduce restrictions on the use of GMOs and of products that contain GMOs, in order to protect human health and the Polish environment from the risks arising from GMOs. The draft legislation provides in particular restrictions for the use of GMOs as seeds or otherwise in agricultural activities. These restrictions are justified under EC law for the following reasons:

   (a) seeds and other genetically modified plants or animals which have the capacity to multiply in the living environment, are living beings and not "products" or "goods" in the sense of the EC Treaty. The Treaty does differentiate between living beings and goods, as can be seen clearly in Article 30 EC Treaty, which provides Member States with the special right to adopt measures prohibiting or restricting the free movement of goods when needed to protect the health and life of humans, animals or plants. Since Directive 2001/18 regulates living beings, it should have been based also on Article 175 EC Treaty and not exclusively on Article 95. As expressly recognised by the European Court of Justice (C-178/03) Community's legal acts can be based on two legal provisions.

   The fact that Directive 2001/18 was enacted exclusively on the basis of Article 95 EC Treaty – which happened before Poland became a member of the EU – cannot deprive Member States from the possibility to apply the provisions of Article 176 EC Treaty which allows Member States to maintain or introduce protective measures more stringent than those adopted at EU level. Indeed, the very *raison d'être* of Article 176 is to allow member States to decide themselves on the safeguard and protection of their environment and to fix, if necessary, a better protection than the one that was decided by the EU.

   (b) Poland intends to introduce restrictions for the use of plants – including seeds – or animals (living beings) in order to protect its environment. This does not hinder or violate the Community principles on the free movement of good. These restrictions are not different from restrictions which, for example, Germany introduced when providing for a collective liability of all farmers for damages caused by GMO plants.

   It is obvious that the free circulation of goods does not determine the use of the good. A car, which may circulate freely all over the Community, is nevertheless obliged only to use roads which have been opened to cars. The same applies to airplanes which are only allowed to use airports. In the same way a Member State has the right to determine in which areas of its territory genetically engineered seeds can be planted; their acceptance as seeds by the Community does not imply that they may be used everywhere, without further conditions.

   Where a Member State does not have, or install, airports, that State is not obliged to allow, in the name of the free circulation of goods, the landing and take off of airplanes. This is happened some years ago with the civil super-sonic aircraft Concorde, which was not allowed to circulate in most EU Member States. This example shows that the Commission is misinterpreting EC law by confusing the notion of "placing on he market" with that of "use". The draft Polish law does not breach the authorisation system put in place by Directive 2001/18 since Poland only

intends to restrict the use of GMOs in its territory not the placing on the market of authorised GMOs.

(c) The Polish measures implement the precautionary principle. As regards GMOs in plants and animals, there is a fundamental difference between having products which contain GMOs on the shelves of supermarkets and having them in the environment. This difference is largely ignored by Directive 2001/18. When a product is on the shelf of a shop, consumers might choose the product if they wish, provided it clearly indicates that it contains GMOs. In the environment, there is no such choice. Cross-pollination is normal and nature does not know borders between GMO-free plants and animals and those that have been genetically engineered. If the use of GM plants and animals were allowed without restriction, within few years cross-fertilisation would lead to a situation where all plants would, to some degree, be affected by GMOs. The Polish measures are therefore also justified under the precautionary principle, to prevent such future contamination.

2. EC law has not, until now, imposed on Member States the use of a specific technology. Member States are, for example, free to use nuclear energy for the production of energy or not. They are allowed to decide whether to permit the use of waste incinerators or not, or to allow or forbid the landing of civil super-sonic aeroplanes. Until now, the EU has not tried to impose, in the name of free circulation of goods, the use of nuclear energy, or of any other technology. Hence, it should not act differently in the case of GMOs. Here, the Commission tries to oblige Member States to admit, on their territory, the growing of certain plants – and tomorrow, the existence of certain animals – invoking, as the only justification, the free circulation of goods.

   This is a departure from basic principles of the European Union, which is all the more prejudicial as GMOs constitute an interference in plant and animal life. One of the basic principles of the European Union is that it is up to the Member States to decide on the use of certain technologies on their territory, not to the EU. Where Member States do not wish to recur to a certain technology – be it a technology that modifies living beings – they must be allowed to do so. Article 95 EC Treaty does not contain any element that would justify departing from this basic principle of the European Union.