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*Committee on Legal Affairs  
The Chair*

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28.4.2010

Ms Carmen Fraga Estévez  
Chair  
Committee on Fisheries  
BRUSSELS

**Subject:** Opinion on the legal basis of the use of alien and locally absent species in aquaculture (amendment of Regulation (RC) No 708/2007) (COM(2009)0541 – C7-0272/2009 – 2009/0153(COD))

By letter of 18 March 2010 you asked the Committee on Legal Affairs pursuant to Article 37 of the Rules of Procedure to consider whether the legal basis of the above Commission proposal was valid and appropriate.

At its meeting of 28 April 2010, the committee considered:

- whether Article 43(2) constitutes the sole appropriate legal basis;
- and whether Articles 43(2) and 349 TFEU can be adopted as a joint legal basis for a given legislative procedure as they provide for the application of different legislative procedures.

## **I. Background**

Council Regulation (EC) No 708/2007 concerning use of alien and locally absent species in aquaculture ("the Regulation") was adopted on 11 June 2007. It establishes a framework governing aquaculture practices in relation to alien and locally absent species in order to assess and minimise the possible impact of these species and any associated non-target species on aquatic habitats. The Regulation provides for a permit system to be established at national level.

According to Article 2(7) of the Regulation, introductions and translocations for use in "closed aquaculture facilities" may at a future date be exempted from the permit requirement of Chapter III of the regulation, in the light of new scientific information and advice.

Under the Sixth Framework Programme, a concerted action was funded with the title "Environmental impacts of alien species in aquaculture" (the IMPASSE project). Its overall goal was to develop guidelines for environmentally sound practices for introductions and translocations in aquaculture. In addition, special attention would be given to assessing whether modern land-based closed aquaculture facilities could be considered biosecure and to what extent movements into these facilities can be differentiated from movements into open aquaculture facilities under Community rules.

The recently submitted final report on the IMPASSE project has delivered an operational definition of "closed aquaculture facilities" which is more detailed and stricter than the current definition given by Article 3(3) of Council Regulation No 708/2007.

The objective of the proposal is to make the necessary technical changes to the definition of "closed aquaculture facility" in order to exempt introductions and translocations for use in such facilities from the permit requirement of Chapter III of Council Regulation No 708/2007. The aim is to remove red tape while ensuring adequate environmental protection in the use of alien and locally absent species in aquaculture.

## **II. The proposed legal bases**

The legal bases which have been put forward for the proposed regulation are as follows:

Article 43(2) TFEU

*The European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, shall establish the common organisation of agricultural markets provided for in Article 40(1) and the other provisions necessary for the pursuit of the objectives of the common agricultural policy and the common fisheries policy.*

This is the sole legal basis put forward by the Council.

Article 349 TFEU

*Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by*

*the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.*

*The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.*

*The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.*

This is the second legal basis for the Regulation No 708/2007 as advocated by the Commission.

### **III. The case-law**

It is settled case-law that the choice of legal basis for a Community measure must rest on objective factors amenable to judicial review, which include in particular the aim and content of the measure<sup>1</sup>.

In principle, a measure is to be founded on only one legal basis. If examination of the aim and the content of a Community measure reveals that it pursues a twofold purpose or that it has a twofold component, falling within the scope of different legal bases, and if one is identifiable as the main or predominant purpose or component, whereas the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main or predominant purpose or component<sup>2</sup>.

Only if, exceptionally, it is established that the measure simultaneously pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, will that measure have to be founded on the various corresponding legal bases, insofar as their procedures are compatible<sup>3</sup>.

Recourse to a dual legal basis is not possible where the procedures laid down for each legal basis are incompatible with each other (it is noted in this connection that whereas Article 349 provides for mere consultation of Parliament, it does not provide for qualified majority voting in the Council)<sup>4</sup>.

### **IV. Analysis of Regulation No 708/2007 and the proposal for an amending regulation**

The Regulation creates a system whereby the introduction or translocation of alien or locally absent species (hereinafter "alien species") into Community environments can be regulated in

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<sup>1</sup> Case C-440/05 *Commission v. Council* [2007] ECR I-9097.

<sup>2</sup> Case C-91/05 *Commission v. Council* [2008] ECR I-3651.

<sup>3</sup> Case C-338/01 *Commission v. Council* [2004] ECR I-4829.

<sup>4</sup> Case C-178/03 *Commission v. Parliament and Council* [2006] ECR I-107.

such a way that the economic benefit of exploiting these species through aquaculture does not come at the expense of biodiversity and other environmental goods. The Regulation achieves this by establishing a permit system which provides for the scientific assessment of the risks associated with a movement by the receiving Member State. It goes on to prescribe procedures for movements which have gained permission.

The proposal is essentially a technical adjustment to this system. It gives a more comprehensive definition of "closed aquaculture facility" and goes on to set up an exemption whereby alien species can be introduced into these biologically secure facilities without the cost and administrative burden of permit applications.

The legal bases of the original regulation are treaty articles of very different scope which share a reference to common agricultural and fisheries policies. Article 43(2) TFEU mandates measures necessary to establish the Europe-wide common agricultural and fisheries markets. Article 349 is a far more particular provision, aimed exclusively at the Union's most remote island regions, which have particular economic and social problems. Many if not all of them have different indigenous species. It enables the European legislature to tailor Community rules to take account of the specific and unusual needs of those regions.

It is noteworthy that the Regulation makes only brief reference to the outermost regions. Article 2(5) establishes an exemption for species (listed in Annex 4) which may once have been considered alien but which, due to the length of time they have been present in the Community without any adverse environmental effects, are no longer so considered. Article 24 envisages a process, conducted along the lines of rules to be adopted by the Commission, whereby Member States can apply to have species of fish added to Annex IV. Article 24(6) provides that:

*Member States concerned may propose in respect of their outermost regions, as referred to in Article 299(2) of the Treaty establishing the European Community [now Article 349 TFEU], the addition of species to be included in a separate part of Annex IV.*

The purpose of this provision is clear, but it can be hardly regarded as constituting "specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions" within the meaning of Article 349 TFEU.

Moreover, there is no reference whatsoever in the recitals to the Regulation or in the subsequent amending regulation to the remote island regions referred to in Article 349. Furthermore, the Commission's proposal provides no justification for recourse to the second legal basis either in the explanatory memorandum or in the preamble to the proposed amending regulation.

The Court's case-law dealing with the choice of appropriate legal basis speaks of the exercise as one of finding the "centre of gravity" of the legislative measure. There is no question that the centre of gravity of the regulation lies in the field covered by Article 43(2) TEU. As the Legal Service has rightly pointed out "the proposal only deals with matters related to the promotion of aquaculture".

The reference to the remote island regions referred to in Article 349 TFEU is marginal and by no means sufficient to justify recourse to two legal bases.

## **V. Conclusion and Recommendation**

In light of the foregoing it is clear that Article 43(2) TFEU is the sole appropriate legal basis for this proposal.

At its meeting of 28 April 2010 the Committee on Legal Affairs accordingly decided, unanimously<sup>1</sup>, to recommend that you adopt Article 43(2) of the Treaty on the functioning of the European Union as the sole appropriate legal basis.

Yours sincerely,

Klaus-Heiner Lehne

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<sup>1</sup> The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Kurt Lechner (rapporteur), Piotr Borys, Sergio Gaetano Cofferati, Christian Engström, Eva Lichtenberger, Antonio López-Istúriz White, Antonio Masip Hidalgo, Bernhard Rapkay, Francesco Enrico Speroni, József Szájer, Alexandra Thein, Diana Wallis, Cecilia Wikström, Tadeusz Zwiefka