



EUROPEAN PARLIAMENT

2009 - 2014

*Committee on Legal Affairs
The Chair*

13.7.2011

Mr Paolo De Castro,
Chair
Committee on Agriculture and Rural Development
BRUSSELS

Subject: ***Opinion on the legal basis of the proposal for a regulation of the European Parliament and of the Council laying down specific measures for agriculture in the outermost regions of the Union [COM(2010)0498]***

Dear Mr Chair,

By letter of 8 June 2011 you asked the Committee on Legal Affairs, pursuant to Rule 37 of the Rules of Procedure, to consider the addition of a legal basis to the above proposal for a regulation.

The legal bases proposed by the Commission are the first subparagraph of Article 42 and Article 43(2) TFEU, both of which fall under Title III on "Agriculture and Fisheries" of Part Three of the TFEU, entitled "Union Policies and Internal Actions".

The legal basis proposed to be added is Article 349 TFEU under Part Seven of the TFEU on "General and Final Provisions", which article sets out the procedure for adopting specific measures aimed, in particular, at laying down the conditions of application of the Treaties to the outermost regions of the Union.

I - Background

With the proposal at hand the Commission has initiated the procedure for a recasting of Regulation (EC) 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the Union¹ in the interest of clarity and in order to bring it into conformity with the Lisbon Treaty, notably concerning delegated and implementing acts according to Articles 290 and 291 TFEU.

The legal bases for Regulation (EC) No 247/2006 were Articles 36, 37 and 299(2) TEC, which correspond to Articles 42, 43 and 349 TFEU, respectively.

Regulation (EC) No 247/2006 is accompanied by a Commission Regulation², adopted on the basis of Article 25 of the basic act, containing detailed rules on its application, which has been amended three times, the last time in 2009.

In their respective opinions on the proposal, the Committee on Regional Development and the European Economic and Social Committee have both recommended the addition of Article 349 TFEU to the legal basis.

II - Relevant Articles of the TFEU

The following Articles are presented as the legal bases in the Commission proposal (the added emphasis indicates the operative provisions):

Article 39

1. The objectives of the common agricultural policy shall be:

(a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;

(b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;

(c) to stabilise markets;

(d) to assure the availability of supplies;

(e) to ensure that supplies reach consumers at reasonable prices.

2. In working out the common agricultural policy and the special methods for its application, account shall be taken of:

¹ OJ L 42, 14.2.2006, p. 1.

² Commission Regulation (EC) No 793/2006 of 12 April 2006 laying down certain detailed rules for applying Council Regulation (EC) 247/2006 laying down specific measures for agriculture in the outermost regions of the Union (OJ L 145, 31.5.2006, p. 1).

- (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;*
- (b) the need to effect the appropriate adjustments by degrees;*
- (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.*

Article 40

1. In order to attain the objectives set out in Article 39, a common organisation of agricultural markets shall be established.

This organisation shall take one of the following forms, depending on the product concerned:

- (a) common rules on competition;*
- (b) compulsory coordination of the various national market organisations;*
- (c) a European market organisation.*

2. The common organisation established in accordance with paragraph 1 may include all measures required to attain the objectives set out in Article 39, in particular regulation of prices, aids for the production and marketing of the various products, storage and carryover arrangements and common machinery for stabilising imports or exports.

The common organisation shall be limited to pursuit of the objectives set out in Article 39 and shall exclude any discrimination between producers or consumers within the Union.

Any common price policy shall be based on common criteria and uniform methods of calculation.

Article 42

The provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council within the framework of Article 43(2) and in accordance with the procedure laid down therein, account being taken of the objectives set out in Article 39.

The Council, on a proposal from the Commission, may authorise the granting of aid:

- (a) for the protection of enterprises handicapped by structural or natural conditions;*
- (b) within the framework of economic development programmes.*

Article 43

1. The Commission shall submit proposals for working out and implementing the common agricultural policy, including the replacement of the national

organisations by one of the forms of common organisation provided for in Article 40(1), and for implementing the measures specified in this Title.

These proposals shall take account of the interdependence of the agricultural matters mentioned in this Title.

2. 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.

3. The Council, on a proposal from the Commission, shall adopt measures on fixing prices, levies, aid and quantitative limitations and on the fixing and allocation of fishing opportunities.

4. In accordance with paragraph 2, the national market organisations may be replaced by the common organisation provided for in Article 40(1) if:

(a) the common organisation offers Member States which are opposed to this measure and which have an organisation of their own for the production in question equivalent safeguards for the employment and standard of living of the producers concerned, account being taken of the adjustments that will be possible and the specialisation that will be needed with the passage of time;

(b) such an organisation ensures conditions for trade within the Union similar to those existing in a national market.

5. If a common organisation for certain raw materials is established before a common organisation exists for the corresponding processed products, such raw materials as are used for processed products intended for export to third countries may be imported from outside the Union.

The following Article is proposed to be added to the legal basis:

Article 349

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.

III - The proposed legal bases

The first subparagraph of Article 42 TFEU provides that Parliament and the Council are to determine, within the framework of Article 43(2) TFEU, the extent to which competition rules are to apply to the production of and trade in agricultural products. In doing so, they are obligated to take account of the objectives of the common agricultural policy set out in Article 39.

Article 43(2) TFEU provides the general legal basis for the common agricultural policy, whereby Parliament and the Council are to establish the common organisation of agricultural markets, as set out in Article 40 TFEU, by means of the ordinary legislative procedure.

Article 349 TFEU provides for a legal basis concerning the conditions of application of the Treaties to the outermost regions, including common policies, whereby the Council, on a proposal from the Commission and after consulting Parliament, adopts special measures for those regions. According to this article the Council alone adopts measures and the Parliament is merely consulted. It is however important to note that by virtue of Article 16(3) TEU the Council acts by a qualified majority given that Article 349 TFEU does not provide otherwise.

IV - Case-law on legal basis

It is settled case law of the Court of Justice 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*"¹. The choice of an incorrect legal basis may therefore justify the annulment of the act at stake.

With regard to a measure that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the Court has held that, where various provisions of the Treaty are therefore applicable, such a measure will have to be founded on the various corresponding legal bases.²

¹ Case C-45/86, *Commission v. Council* (Generalised Tariff Preferences) [1987] ECR 1439, para. 5; Case C-440/05 *Commission v. Council* [2007] ECR I-9097; Case C-411/06 *Commission v. Parliament and Council* (8 September 2009) (*OJ C 267* of 07.11.2009, p.8).

² Case C-155/07 *Parliament v. Council* [2008] ECR I-8103, para. 36.

V. Aim and content of the proposed regulation

In the explanatory memorandum of the proposal the Commission specifies that its main purpose is to align Regulation (EC) No 247/2006 with the TFEU.

As concerns delegated acts, under the proposal the Legislator reserves the right to issue decisions concerning the essential elements of a specific scheme for certain agricultural products in the outermost regions, in order to remedy the difficulties caused by their extreme remoteness (the Programmes of Options Specifically Relating to Remoteness and Insularity, POSEI). The general guidelines for this scheme and the general principles which underpin them are determined by the Legislator. In accordance with Article 290 TFEU, the Legislator entrusts the Commission with the task of supplementing or amending certain non-essential elements. A Commission delegated act may therefore set out additional elements which are necessary for the smooth running of the scheme defined by the Legislator. Under the proposal the Commission may therefore adopt, by means of a delegated act, conditions and measures under the POSEI programmes.

The Member States, in accordance with Article 291 of the Treaty on the Functioning of the European Union, are responsible for implementing the scheme defined by the Legislator. According to the Commission it would however appear necessary to ensure that the POSEI programmes are applied in a uniform manner across all Member States in order to avoid unfair competition or discrimination between operators. Under the proposal the Legislator therefore grants the Commission the power to implement, in accordance with Article 291(2) of the Treaty, certain aspects of the programmes.

The first five recitals of the proposal read as follows (emphasis added):

- (1) *Specific measures in the agricultural sector in order to remedy the difficulties caused by the specific situation facing the European Union's outermost regions, as referred to in Article 349 of the Treaty, have been established by Council Regulation (EC) No 247/2006 of 30 January 2006 laying down specific measures for agriculture in the outermost regions of the Union¹. These measures have been implemented by means of support programmes for each region, which constitute an essential tool for supplying such regions with agricultural products. In view of the new amendments which have become necessary and following the entry into force of the Lisbon Treaty, it is necessary to repeal Regulation (EC) No 247/2006 and replace it with a new text.*
- (2) *The fundamental objectives which the scheme promoting the Union's outermost regions will help to meet, need to be specified.*

¹ OJ L 42, 14.2.2006, p. 1.

- (3) The content of the Programmes of Options Specifically Relating to Remoteness and Insularity ('POSEI programmes') which, in accordance with the principle of subsidiarity, must be established by the Member States concerned at the most appropriate geographical level and submitted by the Member States to the Commission for approval, must also be specified.
- (4) In order to achieve the objectives of the scheme promoting the Union's outermost regions more effectively, the POSEI programmes must include measures which ensure the supply of agricultural products and the preservation and development of local agricultural production. The level of programming for the regions concerned needs to be harmonised and the policy of partnership between the Commission and the Member States needs to become more systematic.
- (5) In keeping with the principle of subsidiarity and in order to ensure flexibility, two principles which form the basis of the programming approach adopted for the scheme promoting the Union's outermost regions, the authorities appointed by the Member State may propose amendments to the programme to bring it into line with the reality of the situation in the outermost regions. Also in keeping with this approach, the procedure for amending the programmes must be adapted to reflect the level of relevance of each type of amendment.

Article 2 of the proposal, which has the heading "Objectives", provides that the act seeks to meet the two following objectives (emphasis added):

- a) [to guarantee] supply to the outermost regions of products essential for human consumption or for processing and as agricultural inputs by mitigating the additional costs due to extreme remoteness;
- b) [to preserve and develop] agricultural activities in the outermost regions, including the production processing and the sale of local products.

In addition to the inclusion of provisions on delegated and implementing acts, the proposal also includes certain minor updating amendments to take account of changes in Union legislation and the practical implementation of the 2006 Regulation.

The draft report of the Committee on Agriculture and Rural Development contains 74 amendments to the text proposed by the Commission, the first of which seeks to introduce Article 349 TFEU as an additional legal basis. Amendment 19 furthermore specifies that this article should be taken into account to grant "*the outermost regions special status with a view to fostering their development and integration on an equal footing with the rest of the Union through specific programmes tailored to their specific situation*". The rest of the amendments in the draft report primarily concern technical provisions on delegated and implementing acts.

VI - Determination of the appropriate legal basis

Taking into account that Regulation (EC) No 247/2006, which is to be recast by the proposal, was based in part on the TEC predecessor to Article 349 TFEU, and that the aim and content of the proposal directly concern the scope and content of specific measures for the outermost regions, as well as their implementation, Article 349 TFEU must clearly be included in the legal basis.

Although Article 349 TFEU, unlike Article 43(2) TFEU, does not provide for the application of the ordinary legislative procedure, it provides that the Council is to act by a qualified majority. Consequently, these articles are not procedurally incompatible.

VII - Conclusion and recommendation

In light of the foregoing analysis Article 349 TFEU must be added to the first subparagraph of Article 42 and Article 43(2) TFEU to form the legal basis for the proposed regulation.

At its meeting of 11 July 2011, the Committee on Legal Affairs accordingly decided by 21 votes in favour, with no abstention¹, to recommend to you as follows: the proposal for a regulation of the European Parliament and of the Council laying down specific measures for agriculture in the outermost regions of the Union [COM(2010)0498] should be based on the first subparagraph of Article 42 TFEU, Article 43(2) TFEU and Article 349 TFEU.

Yours sincerely,

Klaus-Heiner LEHNE

¹ The following were present for the final vote: Klaus-Heiner Lehne (Chair), Luigi Berlinguer (Vice-Chair), Raffaele Baldassarre (Vice-Chair), Evelyn Regner (Vice-Chair), Sebastian Valentin Bodu (Vice-Chair), Marielle Gallo, Giuseppe Gargani, Rainer Wieland, Tadeusz Zwiefka, Antonio Masip Hidalgo, Bernhard Rapkay, Alexandra Thein, Cecilia Wikström, Christian Engström, Francesco Enrico Speroni, Dimitar Stoyanov, Kurt Lechner, Paulo Rangel, Dagmar Roth-Behrendt, Toine Manders, Eva Lichtenberger.