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Committee on Legal Affairs  
The Chair

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22.6.2018

Mr Czesław SIEKIERSKI  
Chair  
Committee on Agriculture and Rural Development  
BRUSSELS

Subject: Opinion on the legal basis of the Proposal for a Decision of the European Parliament and of the Council amending Council Decision 2003/17/EC as regards the equivalence of field inspections carried out in Brazil on fodder plant seed-producing crops and cereal seed-producing crops and on the equivalence of fodder plant seed and cereal seed produced in Brazil, and as regards the equivalence of field inspections carried out in Moldova on cereal seed-producing crops, vegetable seed-producing crops and oil and fibre plant seed-producing crops and on the equivalence of cereal seed, vegetable seed and oil and fibre plant seed produced in Moldova (COM(2017)0643 – C8-0400/2017 – 2017/0297(COD))

Dear Mr Chair,

By letter of 24 April 2018 you asked the Committee on Legal Affairs pursuant to Rule 39(2) to consider whether the legal basis of the above Commission proposal was appropriate.

The committee considered the above question at its meeting of 20 June 2018.

The proposal states as the legal basis the Treaty on the Functioning of the European Union (TFEU), without any further specification and provisions contained in the four sectorial directives and empowering the Council to decide on equivalence (respectively, Article 16(1) of Directive 66/401; Article 16(1) of Directive 66/402; Article 37(1) of Directive 2002/55; Article 20(1) of Directive 2002/571).

### **I. Background**

The above mentioned Commission proposal relates to import of seeds from non-EU countries. It proposes to add Brazil and Moldova to the list of countries whose control systems are recognised

with respect to certain species of seeds. For this purpose Council Decision 2003/17/EC on field inspections and equivalence of seeds in non-EU countries would be amended.

Union legislation on marketing of seeds is set out in a horizontal directive (Council Directive 2002/53/EC on the common catalogue) and several sectorial directives covering specific types of crops (fodder-plants, cereals, oil and fibre plants, fruit, beets, etc.). Moreover, under those directives several implementing measures have been adopted over time. The objective of this legislation is to contribute to agricultural productivity and availability of supplies by ensuring that marketed seeds have sufficient germination capacity and are free from disease. The main rule is that seeds can be put on the Union market only if they belong to a registered variety (that they appear in a “catalogue”) and that they are part of a lot which has been certified.

Certification aims to ensure that seeds actually belong to the variety they are claimed to be, that they are healthy and of good quality. Certification is carried out by official bodies or under official supervision; it involves “field inspections”, that is, visual inspections on the growing field and on lots, as well as sampling and testing.

The present proposal relates to four sectorial Directives: Council Directive 66/401/EEC dealing with marketing of fodder plant seed, Council Directive 66/402/EEC on marketing of cereal seed, Council Directive 2002/55/EC on marketing of vegetable seed and Council Directive 2002/57/EC on marketing of seed of oil and fibre plants.

Those acts provide for the possibility that seed harvested in a third country and affording the same assurances as regards characteristics and examination is considered equivalent to seed harvested in the Union, or that field inspections carried out on seed-producing crops in a third country are considered compliant with EU requirements. The four above mentioned directives provide that the Council, acting by a qualified majority on a proposal from the Commission, determines the third countries to be granted equivalence.

On the basis of those provisions, Council Decision 2003/17/EC (the act to be amended by the current proposal) has established that certain seeds - namely fodder plant, cereal, vegetable and oil and fibre plants seeds - produced in listed third countries are to be considered equivalent to seeds of the same kind produced in the Union and that field inspections on seed-producing crops carried out in those countries comply with the relevant Union requirements. The Decision also contains some provisions on relabeling and refastening of seed taking place in the Member States’ territory. Annex I to the Decision contains the list of crops and of third countries for which equivalence is granted.

The proposal at issue would add Brazil to that list of third countries with respect to fodder plant seed and cereal seeds and Moldova with respect to cereal seed, vegetable seed and oil and fibre plant seed. The proposal also makes minor modifications to the provisions on relabeling and refastening of seed.

## **II. Proposed legal basis**

The proposal has a multiple legal basis: the Treaty on the Functioning of the European Union (TFEU), without any further specification and the provisions contained in the sectoral directives<sup>1</sup>

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<sup>1</sup> Council Directive 66/401/EEC dealing with marketing of fodder plant seed; Council Directive 66/402/EEC on marketing of cereal seed; Council Directive 2002/55/EC on marketing of vegetable seed; Council Directive 2002/57/EC on marketing of seed of oil and fibre plants.

and empowering the Council to decide on equivalence (respectively, Article 16(1) of Directive 66/401; Article 16(1) of Directive 66/402; Article 37(1) of Directive 2002/55; Article 20(1) of Directive 2002/57i).

### **III. Relevant provisions of the Treaty**

Article 43(2) TFEU reads:

*“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”.*

### **IV. Case-law on the choice of legal basis**

According to the settled case law of the Court of Justice, *“the choice of legal basis for a [Union] measure must rest on objective factors amenable to judicial review, including in particular the aim and the content of the measure”*.<sup>1</sup> The generic reference to the TFEU is therefore insufficient as it makes the legal basis undetermined, which would prevent the Court from being in a position to review its appropriateness. Thus, a reference to the Treaty as a whole as it stands does not comply with the basic requirement set by the Court in this regard.

One of the main principles of the European Union is that it derives its powers from the Treaty, and that it may not act in the absence of such powers as confirmed by the Court of Justice: *“[...] the rules regarding the manner in which the EU institutions arrive at their decisions are laid down in the Treaties and are not within the discretion of the Member States or of the institutions themselves. [...] Accordingly, to acknowledge that an institution can establish secondary legal bases for the adoption of legislative acts or implementing measures, whether for the purpose of strengthening or easing the detailed rules for the adoption of an act, is tantamount to according that institution a legislative power which exceeds that provided for by the Treaties”*<sup>2</sup> Relying on sectorial directives as legal basis would therefore not comply with the case law of the Court of Justice and an act adopted on that basis would be invalid. The proposed legal basis therefore constitute a case of illegal secondary legal basis.

### **V. Content and aim of the proposal**

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<sup>1</sup> [footnote]

<sup>2</sup> Judgment in *Parliament v Council*, Joined Cases C-14/15 and C-116/15, ECLI:EU:C:2016:715, paragraph 47. On this principle, see also *Parliament v Council*, Case C-363/14, ECLI:EU:C:2015:579, paragraph 43; *Parliament v Council*, Case C-540/13, ECLI:EU:C:2015:224, paragraph 32; *Parliament v Council*, Joined Cases C-317/13 and C-679/13, ECLI:EU:C:2015:223, paragraph 42; *Parliament v Council*, Case C-133/06, ECLI:EU:C:2008:257, paragraphs 54 to 56.

The proposal relates to import of seeds. It adds Brazil and Moldova to the existing list of third countries benefiting from EU equivalence with respect to certain species of seeds. By broadening the perspective of imports of good quality seeds. In this sense, the proposal pursues the objective of increasing agricultural productivity and a rational development of agricultural production. It also pursues the objective of securing availability of supplies. Those objectives pertain to the Common Agricultural Policy and are set out in point (a) and (c) of Article 39(1) TFEU.

## **VI. Analysis and determination of the appropriate legal basis**

As stated above, only the Treaty may form a basis for the adoption of an act as the one proposed by the Commission. The secondary legislation referred to by the Commission is thus irrelevant as it cannot be part of the legal basis for the proposal.

Furthermore, a simple generic reference to TFEU is not sufficient, but the co-legislators must amend the proposal by setting out which provision, given the aim and content of the proposal, ought to form the legal basis for it. Given that the content and aim is, as set out above, to implement the Common Agricultural Policy as regards the aspects set out in the proposal, the appropriate legal basis for the proposal is Article 43(2) TFEU.

## **VII. Conclusion and recommendation**

In light of the foregoing, the legal basis of the proposal does not comply with the basic requirements set by the Court of Justice, since it is undetermined as regards its reference to the provisions of the Treaty and consists of provisions of secondary legislation for the rest.

At its meeting of 20 June 2018 the Committee on Legal Affairs accordingly decided, unanimously<sup>1</sup>, to recommend to the Committee on Agriculture and Rural Development to retain Article 43(2) TFEU as the legal basis of the proposal.

Yours sincerely,

Pavel Svoboda

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<sup>1</sup> The following were present for the final vote: Pavel Svoboda (Chair), Jean-Marie Cavada, Lidia Joanna Geringer de Oedenberg (Vice-Chair), Axel Voss (rapporteur for opinion), Joëlle Bergeron, Marie-Christine Boutonnet, Sergio Gaetano Cofferati, Geoffroy Didier, Angel Dzhambazki, Rosa Estaràs Ferragut, Enrico Gasbarra, Mary Honeyball, Sylvia-Yvonne Kaufmann, Gilles Lebreton, António Marinho e Pinto, Angelika Niebler, Evelyn Regner, József Szájer, Francis Zammit Dimech, Tadeusz Zwiefka