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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: Proposal for a Directive of the European Parliament and of the Council
amending Council Directive 2001/110/EC relating to honey

Delegations will find attached Commission document COM(2012) 530 final.

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EUROPEAN COMMISSION

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2012/0260 (COD)

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 2001/110/EC relating to honey

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The aim of the proposal to amend Directive 2001/110/EC relating to honey¹ is to:

- (a) align the existing Commission implementing powers with the provisions laid down in the Treaty on the Functioning of the European Union (TFUE); and
- (b) in the context of the judgment of the Court of Justice in case C-442/09², and, without prejudice to the application of Regulation (EC) No 1829/2003 on genetically modified food and feed³ to honey containing genetically modified (GM) pollen, clarify explicitly the status of pollen as a constituent particular to honey rather than an ingredient of honey.

Grounds for and objectives of the proposal

- (a) The proposal aims to align the existing Commission implementing powers in Directive 2001/110/EC to the differentiation between delegated and implementing powers of the Commission introduced by Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFUE) and to confer additional delegated powers on the Commission.

The Treaty makes a distinction between the powers delegated to the Commission to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act as laid down in Article 290(1) of the Treaty (delegated acts), and the powers conferred upon the Commission to adopt uniform conditions for implementing legally binding Union acts as laid down in Article 291(2) of the Treaty (implementing acts). In the case of delegated acts, the Legislator delegates to the Commission the power to adopt quasi-legislative acts. In the case of implementing acts, the context is very different. Indeed, Member States are primarily responsible for the implementation of legally binding acts of the European Union. However, if the application of the legislative act requires uniform conditions for its implementation, the Commission is authorised to adopt these acts. The alignment of Directive 2001/110/EC on new rules of the Treaty reflects this distinction.

In addition, still in the context of the review of the delegations of powers conferred on the Commission after the entry into force of the Lisbon Treaty, the provisions of the above mentioned Directive have also been scrutinized in order to identify possible supplementary needs in term of powers to be conferred to the Commission under the new classification of the Treaty.

¹ OJ L 10, 12.1.2002, p. 47.

² Case C-442/09, Judgment of the Court (Grand Chamber) of 6 September 2011 (reference for a preliminary ruling from the Bayerischer Verwaltungsgerichtshof (Germany)) — Karl Heinz Bablok and Others v. Freistaat Bayern, OJ C 311, 22.10.2011, p. 7.

³ OJ L 268, 18.10.2003, p. 1.

- (b) Following a reference for a preliminary ruling under Article 234 EC of the Bayerischer Verwaltungsgerichtshof (case C-442/09), the Court of Justice issued a ruling, whereby it qualifies pollen in honey as an ingredient within the meaning of Article 6(4)(a) of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of laws of the Member States relating to the labelling, presentation and advertising of foodstuffs⁴. This conclusion by the Court was based on an assessment of facts brought before the Court according to which the presence of pollen in honey is mainly the result of the action of the beekeeper himself by virtue of centrifugation which he carries out for the purposes of collection. However, pollen only enters into the hive as a result of the activity of the bees. In fact, pollen is found in honey regardless of whether the beekeeper extracts the honey through centrifugation. It appears therefore necessary to clarify in Directive 2001/110/EC that pollen is a natural constituent and not an ingredient of honey. This clarification would however not prevent the applicability of Regulation (EC) No 1829/2003 to honey containing GM pollen⁵, and in particular will not affect the conclusion of the Court of Justice that honey containing GM pollen can be placed on the market only if it is covered by an authorisation in accordance with that Regulation.

In light of these considerations, a draft proposal amending Directive 2001/110/EC has been prepared.

General context

Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFUE) distinguish two different types of Commission acts:

- Article 290 of the TFUE allows the legislator to "delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act". Legal acts adopted by the Commission in this way are referred to in the terminology used by the Treaty as "delegated acts" (Article 290(3)).
- Article 291 of the TFUE allows Member States to "adopt all measures of national law necessary to implement legally binding Union acts". Those acts shall confer implementing powers on the Commission where uniform conditions for implementing them are needed. Legal acts adopted by the Commission in this way are referred to in the terminology used by the Treaty as "implementing acts" (Article 291(4)).

Council Directive 2001/110/EC does not explicitly state if pollen in honey is, or is not, an ingredient in the sense of Article 6(4)(a) of Directive 2000/13/EC. In the absence of such a precision, the Court of Justice, in case C-442-09, issued a ruling whereby it considers based on the assessment of the facts brought before it that pollen is an 'ingredient' within the meaning of Article 6(4)(a) of Directive 2000/13/EC (point 79 of the judgment) of honey. The consequences of this ruling

⁴ OJ L 109, 6.5.2000, p. 29.

⁵ Indeed, after the amendment of Directive 2001/110/EC, honey containing GM pollen will continue to fall under Article 3(1)(c) of that Regulation, as "food produced from GMOs".

are, inter alia, that the labelling rules related to ingredients set out in Directive 2000/13/EC apply, and in particular the obligation to indicate on the label of the product the lists of ingredients (Article 3(1)(2)). Given that pollen is naturally present in honey and enters in the hive as the result of the bees activity independently of the action of the beekeeper, it is necessary to explicitly mention in Directive 2001/110/EC that pollen in honey is not an ingredient within the meaning of Article 6(4)(a) of Directive 2000/13/EC but a constituent. The fact that honey is a natural substance produced by honey bees to which no food ingredient can be added is reflected in the Codex Standard for Honey⁶.

This amendment will not alter the conclusion of the Court of Justice in case C-442/09 that honey containing GM pollen falls under the scope of Regulation (EC) No 1829/2003. Indeed, after the amendment of Directive 2001/110/EC, honey containing GM pollen will continue to fall under Article 3(1)(c) of that Regulation, as "food produced from GMOs".

Existing provisions in the area of the proposal

Articles 290 and 291 of the Treaty on the Functioning of the European Union (TFUE) are applicable for the alignment exercise.

Article 6(4)(a) of Directive 2000/13/EC defines the term 'ingredient' as "any substance, including additives and enzymes, used in the manufacture or preparation of foodstuff and still present in the finished product, even if in altered form".

Consistency with the other policies and objectives of the Union

Not applicable.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

With regard to the alignment of Commission implementing powers with the TFUE, there was no need for consultation of interested parties or for external expertise or an impact assessment since the proposal is an inter-institutional matter, inherent to the entry into force of the Lisbon Treaty.

As regards the nature of pollen in honey, the general interpretation which prevailed before the judgment was that, for the reasons above stated, pollen was a constituent of honey, and not an ingredient within the meaning of Article 6(4)(a) of Directive 2000/13/EC. As a result the labelling rules applicable to ingredients set out in Directive 2000/13/EC (i.a. the list of ingredients) were not deemed to apply to honey. The proposed amendment of the Honey Directive aims at clarifying that pollen is not an ingredient in honey and will therefore have the effect, with regard to the application of the labelling rules set out in Directive 2000/13/EC, to come back to the situation prevailing until the judgment, without prejudice to the application of Regulation (EC) No 1829/2003 to honey containing GM pollen. As a result, no

⁶ CODEX STAN 12-1981.

significant change on interested parties are expected and for this reason, no impact assessment has been carried out.

The Commission has carried out a series of consultations with Member States, in particular in the context of the Standing Committee on the Food Chain and Animal Health (SCFCAH), with stakeholders (including beekeepers associations or NGOs) in particular in the context of the Advisory Group on the Food Chain Animal Health and Plant Health, the Advisory Group for Apiculture, and with third countries in specific meetings that have been organised for this purpose after the ruling, and in the context of different fora of the World Trade Organisation (WTO).

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

Identify the delegated and implementing powers that should be conferred upon the Commission as regards Directive 2001/110/EC and establish the corresponding procedure for adoption of this act in the new legal context determined by the entry into force of Articles 290 and 291 of the TFUE.

Clarify that pollen in honey is not an ingredient in the sense of Article 6(4)(a) of Directive 2000/13/EC of the European Parliament and of the Council.

Legal basis

Article 43 of the Treaty on the Functioning of the European Union.

Subsidiarity principle

The proposal falls under shared competence between the EU and the Member States. In light of the technical nature of the amendment proposed (alignment on rules as regards Commission's implementing powers and clarification of the status of pollen), the proposal does not modify the repartition of competence between the EU and MS as set out by the amended legislation and thus is in line with the subsidiarity principle.

Proportionality principle

The objective pursued by the proposal is to clarify EU legislation to state that pollen is not an ingredient in honey but a constituent in order to adequately reflect in the legislation the natural origin of the presence of pollen in honey. In this context, the proposal introduces in the Honey Directive a limited amendment of a technical nature which does not exceed what is necessary to attain this objective. No alternatives other than amending EU legislation are possible to reach the above mentioned objective, in light of the existence of an ECJ ruling which provides interpretation of existing EU legislation.

In addition, the alignment of the existing Commission implementing powers in Directive 2001/110/EC with the provisions laid down in TFUE stems from the adoption of the Lisbon Treaty and is thus in line with the proportionality principle.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

amending Council Directive 2001/110/EC relating to honey

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee⁷,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Following the judgment of the Court of Justice of 6 September 2011 in case C-442/09⁸, pollen in honey is to be considered as an ingredient within the meaning of Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs⁹. The judgment of the Court was based on the consideration relying on the facts brought before it that pollen in honey is mainly due to the centrifugation carried out by the beekeeper for the purposes of honey collection. However, pollen only enters into the hive as a result of the activity of the bees and it is naturally present in honey regardless of whether or not the beekeeper extracts the honey through centrifugation. It is necessary therefore to clarify, without prejudice to the application of Regulation (EC) No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed¹⁰ to genetically modified pollen in honey, that pollen is a constituent of honey, which is a natural substance that has no ingredients, and not an ingredient within the meaning of Directive 2000/13/EC. Therefore, Council Directive 2001/110/EC of 20 December 2001 relating to honey¹¹ should be amended accordingly.
- (2) Directive 2001/110/EC confers powers on the Commission in order to implement some of its provisions. As a consequence of the entry into force of the Lisbon Treaty,

⁷ OJ C [...], [...], p. [...].

⁸ OJ C 311, 22.10.2011, p. 7.

⁹ OJ L 109, 6.5.2000, p. 29.

¹⁰ OJ L 268, 18.10.2003, p. 1.

¹¹ OJ L 10, 12.1.2002, p. 47.

those powers need to be aligned to Article 290 of the Treaty on the Functioning of the European Union (the Treaty). It is of particular importance that the Commission carries out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing-up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

- (3) In order to ensure uniform compliance, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission to adopt methods to permit verification of compliance of honey with the provisions of Directive 2001/110/EC.
- (4) The Annexes to Directive 2001/110/EC contain technical elements which might have to be adapted or updated to take account of developments in relevant international standards. That Directive does not confer on the Commission appropriate powers to promptly adapt or update those Annexes to take account of developments in international standards. Therefore, for the consistent implementation of Directive 2001/110/EC, the power to adapt or update the Annexes to that Directive to take account not only of technical progress but also of developments in international standards should also be conferred on the Commission.
- (5) Following the adoption of Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety¹², which applies to all stages of production, processing and distribution of food and feed at Union and national level, general Union provisions on foodstuffs apply directly to the products covered by Directive 2001/110/EC. As a consequence, it is no longer necessary for the Commission to have the powers to align the provisions of that Directive to the general Union legislation on foodstuffs. The provisions conferring such powers should therefore be deleted.
- (6) Therefore, in order to take account of technical progress and, where appropriate, the developments in international standards, the power to adopt acts in accordance with Article 290 of the Treaty should be delegated to the Commission to adapt or update the technical characteristics related to the product descriptions and definitions in the Annexes to Directive 2001/110/EC.
- (7) Directive 2001/110/EC should therefore be amended accordingly.
- (8) Since the amendments related to the alignment to the Treaty concern the Commission powers only, they do not need to be transposed by the Member States,

¹² OJ L 31, 1.2.2002, p. 1.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Directive 2001/110/EC is amended as follows:

(1) In Article 2, the following point is added:

"5. Pollen, being a natural constituent particular to honey, shall not be considered an ingredient, within the meaning of Article 6(4) of Directive 2000/13/EC, of the products defined in Annex 1 to this Directive".

(2) Article 4 is replaced by the following:

"Article 4

The Commission shall be empowered to adopt delegated acts in accordance with Article 6a to set out methods to permit verification of compliance of honey with the provisions of this Directive. Until the adoption of such methods, Member States shall, whenever possible, use internationally recognised validated methods such as those approved by Codex Alimentarius to verify compliance with the provisions of this Directive."

(3) Article 6 is replaced by the following:

"Article 6

The Commission shall be empowered to adopt delegated acts in accordance with Article 6a to amend the technical characteristics related to the names, product descriptions and definitions in Annex I and to the composition criteria for honey in Annex II, to take account of technical progress and, where appropriate, of the developments in relevant international standards.

Article 6a

1. The power to adopt the delegated acts referred to in this Directive is conferred on the Commission subject to the conditions laid down in this Article.
2. The power to adopt delegated acts referred to in Articles 4 and 6 shall be conferred on the Commission for an indeterminate period of time from (...). (*Publications Office is to fill in the date of entry into force of this amending Act*).
3. The delegation of power referred to in Articles 4 and 6 may be revoked at any time by the European Parliament or by the Council. A decision to revoke shall put an end to the delegation of the power specified in that decision. It shall take effect the day following the publication in the *Official Journal of the European Union* or at a later date specified therein. It shall not affect the validity of the delegated acts already in force.
4. As soon as it adopts a delegated act, the Commission shall notify it simultaneously to the European Parliament and to the Council.

5. A delegated act adopted pursuant to Articles 4 and 6 shall enter into force only if no objection has been expressed either by the European Parliament or the Council within a period of two months from the date of notification of that act to the European Parliament and the Council or if, before the expiry of that period, the European Parliament and the Council have both informed the Commission that they will not object. That period shall be extended by two months at the initiative of the European Parliament or of the Council."

(4) Article 7 is deleted.

Article 2

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with Article 1, point (1) by [date]. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by Article 1, point (1) of this Directive.

Article 3

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Directive is addressed to the Member States

Done at Brussels,

For the European Parliament
The President

For the Council
The President