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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 39th session of the Executive Body under the Convention on Long-Range Transboundary Air Pollution

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf in the Executive Body of the Convention on Long-Range Transboundary Air Pollution (the Air Convention) in connection with the decision on proposed amendments of Article 3bis and Annex VII to the Air Convention Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (as amended 2012).

2. CONTEXT OF THE PROPOSAL

2.1. The Air Convention and its Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (as amended 2012)

The UNECE Convention on Long-Range Transboundary Air Pollution (the 'Air Convention'), adopted in 1979, is the most advanced regional environmental agreement addressing clean air policy.

Under the Air Convention, the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (the 'Gothenburg Protocol') was agreed in November 1999. It forms the basis for Directive (EC) 2016/2284¹ on the reduction of national emissions of certain atmospheric pollutants that repealed Directive 2001/81/EC² on national emission ceilings. The Gothenburg Protocol was amended in 2012. The amended version entered into force on 7 October 2019.

The European Union is a Party to the Air Convention³ and to the Gothenburg Protocol as amended in 2012⁴. All Member States are Parties to the Air Convention; 21 Member States are Parties to the Gothenburg Protocol⁵ and 15 Member States have so far accepted the 2012 amendment to the Gothenburg Protocol⁶.

2.2. The Executive Body

The Executive Body is the governing body of the Air Convention and is composed of representatives of Parties to the Convention. Pursuant to Article 10 of the Air Convention, the Executive Body shall review the implementation and development of the Air Convention and its Protocols.

¹ Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344, 17.12.2016, p. 1–31.

² Directive 2001/81/EC of the European Parliament and of the Council of 23 October 2001 on national emission ceilings for certain atmospheric pollutants, OJ L 309, 27.11.2001, p. 22–30.

³ 81/462/EEC: Council Decision of 11 June 1981 on the conclusion of the Convention on long-range transboundary air pollution, OJ L 171, 27.6.1981, p. 11–24.

⁴ 2003/507/EC: Council Decision of 13 June 2003 on the accession of the European Community, to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, OJ L 179, 17/07/2003 P. 0001 – 0002; Council Decision (EU) 2017/1757 of 17 July 2017 on the acceptance on behalf of the European Union of an Amendment to the 1999 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, OJ L 248, 27.9.2017, p. 3–75.

⁵ Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom (status of ratifications on 12 August 2019).

⁶ Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Germany, Latvia, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Spain, Sweden, and the United Kingdom (status of ratifications on 12 August 2019).

The Executive Body aims to reach its decisions by consensus.⁷

Amendments to the Gothenburg Protocol shall be adopted by consensus of the Parties present at a session of the Executive Body.⁸

2.3. The envisaged decision of the Executive Body

On 9-13 December 2019, during its 39th session, the Executive Body will discuss and potentially adopt amendments proposed by the USA to Article 3bis and Annex VII of the amended Gothenburg Protocol ('the envisaged act').

The purpose of the envisaged act is to extend the possibility for countries in the Eastern European, Caucasus and Central Asian (EECCA) region to apply a flexible timescale for meeting certain obligations, to facilitate their ratification of the Gothenburg Protocol.

The envisaged act will become binding for the Parties:

- in accordance with Article 13bis of the Gothenburg Protocol, which provides that amendments to the Protocol shall enter into force for the Parties, which have accepted them on the ninetieth day after the date on which two thirds of those that were Parties at the time of the adoption have deposited their acceptance instruments.⁹
- For those Parties having accepted it, a different procedure is foreseen in respect of amendments to annexes IV to XI of the Gothenburg Protocol: such amendments shall become effective one year from the date of communication of the decision to all Parties, except for those Parties that notify the depositary that they are unable to approve the amendment. In the case of 16 or more Parties submitting such a notification, the amendment shall not enter into force¹⁰.

In practice, the proposed amendments will not affect the obligations for Member States since the obligations in question are already part of the EU acquis and applied by Member States. The proposed amendments would however provide a possibility for non-EU Parties, notably in the EECCA region, to continue to use the flexibility already negotiated and agreed as part of the 2012 amendment of the Gothenburg Protocol, for a prolonged period.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

The flexible timescales in Article 3bis and Annex VII of the amended Gothenburg Protocol were agreed and adopted in 2012 with the purpose of providing a simplified entry mechanism to encourage ratification by more Parties. By August 2019, no single EECCA country had yet managed to make use of this flexibility. Following discussions about existing ratification barriers for EECCA countries, the Air Convention Parties at the Working Group on Strategy and Review meeting on 20-24 May 2019 therefore voiced their interest in addressing and extending these flexible timescales.

Without the extension of the flexibility, it is deemed unlikely that EECCA countries will ratify the Protocol in the near future. It is in the interest of the EU that neighbourhood countries ratify the Gothenburg Protocol to help decrease the transboundary air pollution coming from EECCA countries to the EU Member States.

The Directive (EU) 2016/2284 provisions mirror the obligations of the Gothenburg Protocol.

⁷ Rules of procedure for sessions of the Executive Body for the Convention on Long-range Transboundary Air Pollution as adopted by decision 2010/9 and amended by decision 2013/1, Rule 29.

⁸ Gothenburg Protocol (amended 2012), Article 13bis, paragraph 3

⁹ Gothenburg Protocol (amended 2012), Article 13bis, paragraph 3

¹⁰ Gothenburg Protocol (amended 2012), Article 13bis, paragraph 7

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

Article 218(9) of the Treaty on the Functioning of the European Union (TFEU) provides for decisions establishing ‘*the positions to be adopted on the Union’s behalf in a body set up by an agreement, when that body is called upon to adopt acts having legal effects, with the exception of acts supplementing or amending the institutional framework of the agreement.*’

The concept of ‘*acts having legal effects*’ includes acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are ‘*capable of decisively influencing the content of the legislation adopted by the EU legislature*’¹¹.

4.1.2. Application to the present case

The Executive Body is a body set up by an agreement, namely the Air Convention.

The act, which the Executive Body is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 13bis of the Gothenburg Protocol.

The envisaged act does not supplement or amend the institutional framework of the Air Convention or of the Gothenburg Protocol.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union’s behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged act relate to the environment.

Therefore, the substantive legal basis of the proposed decision is Article 191 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 191 TFEU in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Executive Body will amend the Gothenburg Protocol under the Air Convention, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

¹¹ Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 39th session of the Executive Body under the Convention on Long-Range Transboundary Air Pollution

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 191, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Protocol to Abate Acidification, Eutrophication and Ground-level Ozone in amended version adopted 2012 ('the Protocol') under the Convention on Long-Range Transboundary Air Pollution was approved by the Union by Council Decision (EU) 2017/1757 ⁽¹²⁾ and entered into force on 7 October 2019.
- (2) Pursuant to Article 13bis of the Protocol, the Executive Body may adopt amendments to the Protocol and its annexes.
- (3) The Executive Body, during its 39th session on 9-13 December, is to adopt amendments to the Protocol (Article 3bis) and its annexes (Annex VII) with the aim to facilitate ratification of the Protocol by non-EU Parties.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Executive Body, as the subject and content of the Protocol to be amended is covered by the EU acquis and notably Directive (EU) 2016/2284 of the European Parliament and Council ⁽¹³⁾.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the 39th session of the Executive Body of the Convention on Long-Range Transboundary Air Pollution shall be the following:

The proposal tabled by the United States of America to amend Article 3bis and Annex VII of the Protocol to extend the flexibility timescales from 2019 to 2024 and from 2022 to 2028 shall be supported.

¹² Council Decision (EU) 2017/1757 of 17 July 2017 on the acceptance on behalf of the European Union of an Amendment to the 1999 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, OJ L 248, 27.9.2017, p. 3–75.

¹³ Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC, OJ L 344, 17.12.2016, p. 1–31.

Article 2

Refinement to the position referred to in Article 1 may be agreed to, in the light of developments at the 39th session of the Executive Body of the Convention on Long-Range Transboundary Air Pollution, by representatives of the Union, in consultation with the Member States, during on-the-spot coordination meetings, without a further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President