



Brussels, 13.1.2020
COM(2020) 8 final

2020/0005 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the thirteenth meeting of the Conference of the Parties of the Convention on the conservation of migratory species of wild animals (CMS) with regard to proposals from various parties to amend the Appendices to that Convention, and on the withdrawal of a reservation notified to that Convention

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 thirteenth meeting of the Conference of the Parties of the Convention on the conservation of migratory species of wild animals ('the Convention') in connection with the envisaged adoption of decisions concerning amendment of the Appendices of the Convention, and the withdrawal of an existing reservation to that Convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on the conservation of migratory species of wild animals

The Convention on the conservation of migratory species of wild animals aims to conserve terrestrial, marine and avian migratory species throughout their range. It is an intergovernmental treaty, concluded under the aegis of the United Nations Environment Programme, concerned with the conservation of wildlife and habitats on a global scale. The migratory species to be conserved are listed in Appendices I (endangered species) and II (species to be the subjects of agreements) to the Agreement. The Agreement entered into force on 1 November 1983.

The European Union is a party to the Agreement¹. All Member States are parties to the Agreement.

2.2. The Conference of the Parties

The Conference of the Parties is the principal decision-making body of the Convention. Its functions are enumerated in Article VII of the Convention, including powers to assess the conservation status of migratory species and, subsequently, to amend Appendices to the Convention. Decisions at a meeting of the Conference of the Parties require a two-thirds majority of the Parties present and voting, except where otherwise provided for by this Convention.

The Union position concerning amendments of the Appendices is determined by a decision of the Council based on a proposal from the Commission. The EU common positions concerning other draft decisions and resolutions are agreed in prior meetings of the relevant Council working party or at on-the-spot EU coordination meetings.

The thirteenth meeting of the Conference of the Parties will take place in Gandhinagar (India) from 15 to 22 February 2020.

The eighth meeting of the Conference of the Parties which took place in Nairobi, Kenya from 20 to 25 November 2005 adopted a decision to include the species *Cetorhinus maximus* in Appendix I to the Convention.

2.3. The envisaged acts of the Conference of the Parties

On 15 to 22 February 2020, during its thirteenth meeting, the Conference of the Parties is to adopt decisions regarding amendments of the Appendices of the Convention ('the envisaged acts').

The purpose of the envisaged acts is to amend Appendix I and Appendix II of the Convention, as provided for in Article XI of the Convention.

¹ Council Decision 82/461/EEC of 24 June 1982 on the conclusion of the Convention on the conservation of migratory species of wild animals, OJ L 210, 24.6.1982, p. 10.

In accordance with Article III of the Convention, Appendix I of the Convention shall list migratory species which are endangered and for which Parties that are Range States of the species concerned shall endeavour to take various conservation measures and shall prohibit the taking of animals belonging to such species.

Article IV to the Convention stipulates that Appendix II shall list migratory species which have an unfavourable conservation status and which require international agreements for their conservation and management, as well as those which have a conservation status which would significantly benefit from the international cooperation that could be achieved by an international agreement. If the circumstances so warrant, a migratory species may be listed both in Appendix I and Appendix II.

In accordance with Article XI of the Convention, proposals for amendment may be made by any Party. An amendment to the Appendices enters into force for all Parties ninety days after the meeting of the Conference of the Parties at which it is adopted, except for those Parties which make a reservation.

In accordance with Article XI of the Convention, a reservation to an amendment may be withdrawn by written notification to the Depository and thereupon the amendment shall enter into force for that Party ninety days after the reservation is withdrawn.

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

With regard to the thirteenth meeting of the Conference of the Parties of the Convention, and in line with Council Decision 2019/1581 of 16 September 2019, the Union has proposed to amend the Convention as follows:

- (a) an amendment to Appendix I to the Convention to include the species *Tetrax tetrax*;
- (b) amendments to Appendix II to the Convention to include the species *Tetrax tetrax*, *Galeorhinus galeus* and *Sphyrna zygaena*.

Other Parties to the Convention have submitted proposals to amend Appendix I to include the following species: *Elephas maximus indicus*, *Panthera onca*, *Ardeotis nigriceps*, *Houbaropsis bengalensis bengalensis*, *Diomedea antipodensis*, and *Carcharhinus longimanus*.

Other Parties to the Convention have submitted proposals to amend Appendix II to include the following species: *Panthera onca*, *Ovis vignei*, and *Sphyrna zygaena* (regional population which occurs along Brazil, Uruguay, Argentina Exclusive Economic Zones (EEZs) and international adjacent waters).

It is therefore necessary for the Council to take a decision for the purpose of establishing the position to be adopted on behalf of the Union with a view to the thirteenth meeting of the Conference of the Parties with regard to all proposals for amendment.

The Union should in principle support all proposals because they are science-based, in line with Union legislation and with the Union's commitment to international cooperation for the protection of biodiversity, including consideration of how to make best use of scientific information concerning both biological features and fisheries biological reference points.

Adding these species to Appendix I or II to the Convention, as proposed, would not require any change in Union law.

Concerning *Panthera onca*, which is present in the European Union only in French Guiana, where EU nature legislation does not apply, its hunting is forbidden by an order defining a

zero quota with derogatory regimes for traditional subsistence users and extraordinary circumstances covered by article III(5), paragraphs c and d to the Convention.

In the case of the proposal to include the regional population of *Sphyrna zygaena* which occurs along Brazil, Uruguay, Argentina EEZs and international adjacent waters in Appendix II, since this proposal overlaps in substance with the Union's proposal to include the entire global population of this species in Appendix II, the Union proposal should be supported rather than the proposal submitted by the other party. All other proposals should be supported unconditionally.

Furthermore, with regard to the decision taken at the eighth meeting of the Conference of the Parties to include *Cetorhinus maximus* in Appendix I to the Convention, the Union's existing reservation² with regard to inclusion of *Cetorhinus maximus* in Appendix I should be withdrawn since Union law now meets the obligations of the Convention with regard to the protection of this species by Range States as a result of its inclusion in Appendix I.

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*’³.

4.1.2. Application to the present case

The Conference of the Parties is a body set up by an agreement, namely the Convention on the conservation of migratory species of wild animals.

The acts which the Conference of the Parties is called upon to adopt constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Article XI of the Convention on the conservation of migratory species of wild animals.

The envisaged acts do not supplement or amend the institutional framework of the Convention.

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

² Established in 2006 based on *Council Decision of 21 February 2006 relating to the amendment of Appendix I to the Convention on the conservation of migratory species of wild animals, adopted at the eighth meeting of the Conference of the Parties, for the addition of Cetorhinus maximus.*

³ 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.

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 acts relate to environment.

Therefore, the substantive legal basis of the proposed decision is Article 192(1) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 192(1) TFEU, in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the acts of the Conference of the Parties will amend Appendices I and II of the Convention on the conservation of migratory species of wild animals, it is appropriate to publish them in the *Official Journal of the European Union* after their adoption.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Convention on the conservation of migratory species of wild animals ('the Convention') was concluded by the Union by Council Decision 82/461/EEC of 24 June 1982⁴ and entered into force on 1 November 1983.
- (2) Pursuant to Article XI of the Convention, the Conference of the Parties may adopt decisions to amend the Appendices of the Convention.
- (3) The Conference of the Parties, during its thirteenth meeting on 15 to 22 February 2020, is to adopt decisions to amend the Appendices of the Convention.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties, as the decisions will be binding on the Union.
- (5) The Union submitted proposals for inclusion of the species, *Galeorhinus galeus*, *Tetrax tetrax* and *Sphyrna zygaena* in Appendix II to the Convention and the species *Tetrax tetrax* to Appendix I to the Convention, none of which would require any change in EU law.
- (6) Other parties submitted proposals regarding the inclusion of *Elephas maximus indicus*, *Panthera onca*, *Ardeotis nigriceps*, *Houbaropsis bengalensis bengalensis*, *Diomedea antipodensis*, and *Carcharhinus longimanus* to Appendix I and regarding the inclusion of *Panthera onca*, *Ovis vignei*, and *Sphyrna zygaena* (regional population which occurs along Brazil, Uruguay, Argentina EEZs and international adjacent waters) to Appendix II.
- (7) The Union should support its own proposal to include the global population of *Sphyrna zygaena* in Appendix II of the Convention, in preference to the proposal submitted by another party to include only the regional population which occurs along Brazil, Uruguay, Argentina EEZs and international adjacent waters.
- (8) The Union should support all other proposals because they are science-based, in line with the Union's commitment to international cooperation for the protection of

⁴ OJ L 210, 19.7.1982, p. 10.

biodiversity in accordance with Article 5 of the UN Convention on Biological Diversity and decisions taken at the Conference of the Parties under that Convention.

- (9) The EU is not a range state for the species *Elephas maximus indicus*, *Ardeotis nigriceps*, and *Houbaropsis bengalensis bengalensis* so adding these species to Appendix I to the Convention would not require any change in Union law.
- (10) The EU is not a range state for the species *Ovis vignei* so adding this species to Appendix II to the Convention would not require any change in Union law.
- (11) The species *Panthera onca* occurs in the EU only in French Guiana, which falls outside the scope of Council Directive 92/43/EEC of 21 May, 1992 on the conservation of natural habitats and of wild fauna and flora⁵, which only applies to the European territory of the Member States to which the Treaty applies. The protection of species in French Guiana, including of *Panthera onca* is therefore ensured through national legislation. Hence adding this species to Appendix I of the Convention would not require any change in EU law.
- (12) The bird species *Diomedea antipodensis* does not occur in the Union. The Union's Common Fisheries Policy and the regulation of fishing by the relevant regional fisheries management organisations offer the appropriate instruments for the Union to contribute to managing its protection so adding this species to Appendix I to the Convention would not require any change in EU law.
- (13) The Union's Common Fisheries Policy and the regulation of fishing by the relevant regional fisheries management organisations offer the appropriate instruments for the EU to contribute to managing the protection of the fish species *Carcharhinus longimanus*. Furthermore, the fishing and retention of this species are prohibited under Council Regulation 2019/124. Therefore adding this species to Appendix I to the Convention would not require any change in EU law.
- (14) The fishing and retention of the species *Cetorhinus maximus*, which is included in Appendix I to the Convention but concerning which inclusion the Union presently has a reservation in force, are prohibited under Council Regulation 2019/124. Therefore withdrawing this reservation would not require any change in EU law.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the thirteenth meeting of Conference of the Parties shall be the following:

- (1) to support the addition to Appendix I of the following species:
 - (1) *Tetrax tetrax*
 - (2) *Elephas maximus indicus*
 - (3) *Panthera onca*
 - (4) *Ardeotis nigriceps*
 - (5) *Houbaropsis bengalensis bengalensis*
 - (6) *Diomedea antipodensis*

⁵ OJ L 206, 22.7.1992, p. 7.

- (7) *Carcharhinus longimanus*
- (2) to support the addition to Appendix II of the following species:
 - (1) *Tetrax tetrax*
 - (2) *Galeorhinus galeus*
 - (3) *Sphyrna zygaena* (global population)
 - (4) *Panthera onca*
 - (5) *Ovis vignei*

Article 2

The Commission, on behalf of the Union, shall communicate to the Depository the withdrawal of its reservation concerning the inclusion of *Cetorhinus maximus* in Appendix I to the Convention.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*