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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Convention for the Protection of the Marine Environment of the North-East Atlantic on the integration of Macaronesia in the OSPAR maritime area

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the position to be taken on the Union's behalf in connection with the envisaged adoption of an amendment to the Convention for the protection of the marine environment of the North-East Atlantic (the 'OSPAR Convention').

2. CONTEXT OF THE PROPOSAL

2.1. The OSPAR Convention

The OSPAR Convention aims to protect the North-East Atlantic maritime area against the adverse effects of human activities in order to safeguard human health and to conserve marine ecosystems and, when practicable, restore marine areas, which have been adversely affected. It has 16 Contracting Parties: Belgium, Denmark, the EU¹, Finland, France, Germany, Iceland, Ireland, the Netherlands, Norway, Portugal, Spain, Sweden, United Kingdom, Luxembourg and Switzerland. The Convention was open for signature at the Ministerial Meeting of the Oslo and Paris Commissions in Paris on 22 September 1992 and entered into force on 25 March 1998.

2.2. The OSPAR Commission

The OSPAR Commission (established according to Article 10 of the Convention) is made up of representatives of each of the Contracting Parties; it meets at regular intervals and at any time, due to special circumstances. Its duties include supervising the implementation of the Convention and reviewing the condition of the maritime area, the effectiveness of the measures being adopted, the priorities and the need for any additional or different measures.

According to Article 20 of the Convention, each Contracting Party has one vote in the Commission. The EU is entitled to a number of votes equal to the number of its Member States, which are Contracting Parties to the Convention. The EU shall not exercise its right to vote when its Member States exercise theirs and conversely.

According to Article 15(3) of the Convention, the Commission shall adopt amendments of the Convention by unanimous vote of the Contracting Parties.

2.3. The envisaged act of the OSPAR Commission

During the ministerial segment of an annual meeting the OSPAR Commission is to adopt an amendment of Article 1(a) of the Convention adjusting the limits of the OSPAR maritime area to include waters under Portuguese and Spanish jurisdiction and international waters in between ('the envisaged act').

The purpose of the envisaged act is to add the waters surrounding Macaronesia (Madeira and Canaries Islands) to OSPAR's maritime area, so as to ensure a greater coherence of OSPAR with the EU Marine Strategy Framework Directive² and therefore to improve coordination for the protection and conservation of the rich biodiversity and vulnerable ecosystems present in the Macaronesia area.

¹ Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic (OJ L 104, 3.4.1998, p. 1)

² Directive 2008/56/EC of the European Parliament and of the Council of 17 June 2008 establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive) (OJ L 164, 25.6.2008, p. 19).

The amendment to the Convention will enter into force for those Contracting Parties which have ratified, accepted or approved it on the thirtieth day after receipt by the Depositary Government of notifications by at least seven Contracting Parties, in accordance with the provisions of Article 15 of the OSPAR Convention. Thereafter the amendment shall enter into force for any other Contracting Party on the thirtieth day after the deposit of respective ratification, acceptance or approval.

Until the amendment to the OSPAR Convention enters into force, Portugal and Spain, as well as any other Contracting Party, may provisionally apply it, following the relevant provisions of the Vienna Convention on the law of the treaties of 23 May 1969, in particular article 25 on “Provisional application”.

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

The Macaronesia sub-region is part of the North-East Atlantic region according to Article 4 of the Marine Strategy Framework Directive (MSFD) and is the largest marine sub-region of the European seas. It holds a rich diversity of habitats and species, including some, which are also in the OSPAR list of “Threatened and/or Declining Species & Habitats”. Currently, the OSPAR maritime area only partly covers the waters of the Macaronesia sub-region as delimited and agreed at the EU level.

Portugal and Spain, the only EU and OSPAR countries which have territorial waters in Macaronesia, produced a joint proposal for amending the OSPAR Convention to align the OSPAR maritime area with the MSFD delimitations. Such alignment will facilitate the MSFD implementation for the two countries through enhanced collaboration at OSPAR level and will strengthen, through the mobilisation of OSPAR, the protection of the vulnerable species and habitats of this region and of its unique marine and coastal biodiversity.

A Union position is necessary because a legally binding text, the OSPAR Convention to which the EU is a Party, will need to be amended to achieve this alignment. Since it will facilitate implementation of EU legislation and improve protection of the environment, it is proposed that the Union position is to support this amendment to Article 1(a) of the OSPAR Convention.

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 OSPAR Commission is a body set up by an agreement, namely the OSPAR Convention

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.

The act, which the OSPAR Commission is called upon to adopt, constitutes an act having legal effects. The envisaged act has legal effects because it amends an existing act with legal effects, namely the OSPAR Convention.

The envisaged act does not supplement or amend the institutional framework of the OSPAR 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 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 protection of the 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), in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the OSPAR Commission will amend the OSPAR Convention, to which the Union is a Party, it is appropriate to publish it in the *Official Journal of the European Union* after its 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 OSPAR Convention ('the Agreement') was concluded by the Union by Council Decision 98/249/EC of 7 October 1997⁴ and entered into force on 25 March 1998.
- (2) Pursuant to Article 15 of the Agreement, the OSPAR Commission may adopt amendments of the Convention by unanimous vote of the Contracting Parties.
- (3) The OSPAR Commission is to adopt an amendment to Article 1(a) of the OSPAR Convention on the integration of Macaronesia in the OSPAR maritime area.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the OSPAR Commission, as the amendment of the OSPAR Convention will be binding on the Union,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the meeting of the OSPAR Commission shall be to support the amendments to Article 1(a) of the OSPAR Convention on the integration of Macaronesia in the OSPAR maritime area.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

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Council Decision 98/249/EC of 7 October 1997 on the conclusion of the Convention for the protection of the marine environment of the north-east Atlantic (OJ L 104, 3.4.1998, p. 1)