EUROPEAN
COMMISSION

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2023/0074 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union with regard to submitting a proposal for amendment of Appendix I to the Convention on the Conservation of Migratory Species of Wild Animals (CMS) with a view to the 14th meeting of the Conference of the Parties

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 Convention on the Conservation of Migratory Species of Wild Animals (CMS) in connection with submitting proposals for decisions of the 14th meeting of the Conference of the Parties to amend the Appendices to that Convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on the Conservation of Migratory Species of Wild Animals (CMS)

The Convention on the Conservation of Migratory Species of Wild Animals ('the Convention') 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 Convention. The Convention entered into force on 1 November 1983.

The European Union is a party to the Convention[1].

2.2. The Conference of the Parties

The Conference of the Parties is the decision-making body of the Convention with powers to assess the conservation status of migratory species and, subsequently, to amend Appendices I and II to the Convention. In accordance with Article XI of the Convention, proposals for amendment may be made by any Party, and shall be adopted by a two-thirds majority of Parties present and voting.

The fourteenth meeting of the Conference of the Parties will take place in Samarkand (Uzbekistan) from 23 to 28 October 2023. The deadline for submitting proposals for amendments has been fixed by the Secretariat of the Convention, in line with Article XI (3), to be 26 May 2023. 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 fourteenth meeting of the Conference of the Parties with regard to submitting proposals for amendment.

Before the fourteenth meeting of the Conference of the Parties, the Secretariat of the Convention may communicate proposals made by other Parties to amend Appendices I and II to the Convention, which may require a further decision establishing the position to be adopted on behalf of the Union with regard to those proposals.

2.3. The envisaged act of the Conference of the Parties

For the fourteenth meeting of the Conference of the Parties, it is proposed that the Union submits a proposal to amend Appendix I to the Convention to increase the protection of one cetacean species, Baltic Proper harbour porpoise (*Phocoena phocoena*), throughout its distribution range, including outside the Union.

If adopted, the envisaged act will become binding on the Parties in accordance with Article XI of the Convention, which provides that an amendment to the Appendices enters into force for

[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.

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.

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

The Union proposal to amend Appendix I is based on the following considerations: (1) the inclusion of such species is scientifically sound; (2) such an inclusion is consistent with the EU legislation; and (3) the Union is committed to international cooperation for the protection of biodiversity.

The proposal is consistent with the Eighth Environment Action Programme to 2030[2] and the EU Biodiversity Strategy for 2030[3], especially key commitment 14 of the EU Nature Restoration Plan whereby *the by-catch of species is eliminated or reduced to a level that allows species recovery and conservation*. This proposal would not require any change in Union law, as it concerns species which already benefit from appropriate protection under Union law, notably under the EU Habitats Directive[4] (which prohibits the capture or killing of cetaceans within the EU) and under the EU Common Fisheries Policy[5]. The European Commission adopted on 21 February 2023 the "EU Action Plan: Protecting and restoring marine ecosystems for sustainable and resilient fisheries", stemming from the EU Biodiversity Strategy for 2030, calling on EU Member States to adopt or recommend measures to minimise by-catch of the Baltic Sea harbour porpoise (or reduce it to the level that enables the full recovery of the population)[6].

The proposal does not create any new monitoring or reporting requirements. All implementation planning and monitoring would be part of the regular planning and reporting activities under the Convention. Furthermore, there are no budgetary implications.

An informal exchange of preliminary views with the Member States has taken place through a written consultation of the Member State members of the EU Biodiversity Platform (EUBP).

The position to be taken on the Union's behalf should therefore be to authorise the Commission to submit the above-mentioned proposal to the Secretariat of the 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

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2 EUR-Lex - 32022D0591 - EN - EUR-Lex (europa.eu)

3 EUR-Lex - 52020DC0380 - EN - EUR-Lex (europa.eu)

4 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22/07/1992 p. 0007 - 0050

5 Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, OJ L 354, 28.12.2013, p.22

6 See also Commission Delegated Regulation (EU) 2022/303 of 15 December 2021 amending Regulation (EU) 2019/1241 as regards measures to reduce incidental catches of the resident population of the Baltic Proper harbour porpoise (Phocoena phocoena) in the Baltic Sea"

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*'[7].

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 (CMS).

The act which the Conference of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act 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 act does 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 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 environment.

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

4.3. Conclusion

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

[7] 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.

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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[5] 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 Appendices I and II to the Convention.

(3) The Conference of the Parties, during its fourteenth meeting on 23 to 28 October 2023, may adopt such amendments. The Secretariat of the Convention has informed the Parties to the Convention that any proposals for amendment are to be communicated, in accordance with Article XI(3) of the Convention, by 26 May 2023. The Union may, as a Party to the Convention, make such proposals.

(4) It is appropriate to establish the position to be taken on the Union's behalf to submit proposals to amend the Appendices to the Convention, as the decision of the Conference of the Parties will be binding on the Union.

(5) The inclusion of the Baltic Proper harbour porpoise, *Phocoena phocoena,* in Appendix I to the Convention would be scientifically sound on account of its Critically Endangered conservation status, in line with the Union legislation and with the Union's commitment to international cooperation for the protection of biodiversity.

(6) The Union should therefore submit such proposal to amend Appendix I to the Convention. The Commission should communicate the proposal to the Secretariat of the Convention.

HAS ADOPTED THIS DECISION:

Article 1

1. With a view to the fourteenth meeting of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals, the position of the Union is to submit a proposal for an amendment of Appendix I to the Convention to include the Baltic Proper harbour porpoise, *Phocoena phocoena*.

2. The Commission shall communicate this proposal, on behalf of the Union, to the Secretariat of the Convention.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President