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2020/0123 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems as regards the adoption of Common Operational Procedures

(Text with EEA relevance)

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 Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems in connection with the envisaged adoption of a decision regarding the adoption of Common Operational Procedures.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems

The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ('the Agreement') aims to connect the EU Emissions Trading System (EU ETS) with the Swiss one by allowing that allowances issued in one system can be traded and used for compliance in the other one, thus expanding the opportunities for climate change mitigation. The Agreement entered into force on 1 January 2020.

2.2. The Joint Committee

The Joint Committee, established by Article 12 of the Agreement, is responsible for administering the Agreement and ensuring its implementation. It can decide to adopt new annexes to the Agreement or amend existing ones. It can also discuss amendments to the Articles of the Agreement, facilitate the exchange of views on the Parties' legislation and conduct reviews of the Agreement.

The Joint Committee is a bilateral body composed of representatives of the Parties (the EU and Switzerland). Decisions taken by the Joint Committee shall be agreed by both Parties.

Pursuant to Article 3(6) of the Agreement, the Swiss registry administrator and the Union central administrator shall determine common operational procedures (COP) related to technical or other matters necessary for the operation of the link between the European Union Transaction Log (EUTL) of the Union Registry and the Swiss Supplementary Transaction Log (SSTL) of the Swiss registry and taking into account the priorities of domestic legislation. The COP will take effect, when adopted by decision of the Joint Committee.

2.3. The envisaged act of the Joint Committee

During its third meeting, which will be held in 2020, the Joint Committee is to adopt a decision pursuant to Article 3(6) of the Agreement regarding the adoption of Common Operational Procedures ('the envisaged act').

The purpose of the envisaged act is to determine operational procedures to be applied by both sides and relate to technical and other matters necessary for the operation of the link between the EUTL and the SSTL and taking into account the priorities of domestic legislation. To this end, it outlines procedural requirements in terms of operation. With a view to minimising the risk of fraud, misuse or criminal activities involving the registries and to protecting the integrity of the link, details of the necessary procedures as well as their underlying considerations and agreements, should be treated confidentially. Therefore, the envisaged act addresses the necessary elements at a rather high level without revealing procedures and information related to the security and safety of the link. Those should be laid down in further technical guidelines to be developed by a working group in accordance with Article 12(5) of

the Agreement. The working group should at least include the Swiss registry administrator and the Union central administrator, both of which should ensure the continued, effective and efficient operation of the link as well as its adaptation to technical progress and new requirements relating to the safety and security of the link. Due to both the technical and sensitive nature of such guidelines and the need to adapt them to maintain an appropriate level of safety and security of the link, representatives of the Union in the Joint Committee should be informed and, where appropriate, able to agree such guidelines without a further decision of the Council.

The envisaged act will become binding on the parties in accordance with Article 3(6) of the Agreement, which requires that the COP will take effect when adopted by decision of the Joint Committee. In accordance with Article 12(3) of the Agreement, decisions taken by the Joint Committee in the cases provided for in this Agreement will, upon their entry into force, be binding on the Parties.

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

The Council Decision based on this proposal from the Commission determines the position of the European Union concerning the Decision of the Joint Committee to be taken on the adoption of Common Operational Procedures (COP) for the operation of the link between the EUTL and the SSTL.

Article 3(6) of the Linking Agreement requires the development of Common Operational Procedures that will take effect following their adoption by the Joint Committee. The COP determine the operational procedures with which both sides have to comply to make the link between the EUTL the SSTL operational. For this reason, they are necessary for the link to work.

In accordance with Decision No 2/2019 of the Joint Committee[1] of 5 December 2019[2], the COP relate to a provisional solution for operationalising the link between the EU ETS and the ETS of Switzerland. The provisional solution should be available as from May 2020 or as soon as possible thereafter.

The development of a well-functioning international carbon market through bottom-up linking of emissions trading systems is a long-term policy goal of the EU and the international community, notably as a means to achieve the climate objectives of the Paris Agreement. In this respect, Article 25 of the Directive establishing the EU's Emissions Trading System (EU ETS) allows for the EU ETS to be linked with other emissions trading systems provided they are mandatory, have an absolute cap on emissions and are compatible, as it is the case with the Swiss system. Following the entry into force of the Agreement on 1 January 2020, the COP taking effect represents an important step towards the implementation of the Agreement.

[1] The position to be taken on behalf of the EU has been determined by Council Decision (EU) 2019/2106 of 21 November 2019 on the position to be taken, on behalf of the European Union, within the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, as regards the amendment of Annexes I and II to the Agreement (OJ L 318 of 10.12.2019, p. 96).

[2] Available from https://ec.europa.eu/clima/sites/clima/files/ets/markets/docs/decision_201902_swiss_ets_linking.pdf

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 Joint Committee is a body set up pursuant to Article 12 of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

The act, which the Joint Committee is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 12(3) of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

The envisaged act does not supplement or amend the institutional framework of the Agreement.

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) TFEU.

4.3. Conclusion

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

[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.

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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 Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems[1] ('the Agreement') was concluded by the Union by Council Decision (EU) 2018/219[2] and entered into force on 1 January 2020.

(2) Pursuant to Article 3(6) of the Agreement, the Joint Committee may adopt a decision on Common Operational Procedures (COP) developed by the Swiss registry administrator and the Union central administrator that are related to technical and other matters necessary for the operation of the linking, taking into account the priorities of domestic legislation. The COP are then to take effect following their adoption by decision of the Joint Committee.

(3) The Joint Committee, during its third meeting, to be held in 2020, is to adopt the developed Common Operational Procedures.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the COP will be binding on the Union.

(5) Adoption of the COP represents an important element relating to the implementation of the Agreement, as it determines the operational procedures for the link to work and which both sides have to follow.

(6) In accordance with Article 13(1) of the Agreement, the Joint Committee may agree on technical guidelines to ensure the proper implementation of the Agreement including technical or other matters necessary for the operation of the linking and taking into account the priorities of domestic legislation. The technical guidelines should be developed by a working group set up pursuant to Article 12(5) of the Agreement. The

[1] OJ L 322, 7.12.2017, p. 3.

[2] Council Decision (EU) 2018/219 of 23 January 2018 on the conclusion of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (OJ L 43, 16.2.2018, p. 1).

working group should at least include the Swiss Registry administrator and the Union Registry central administrator and should furthermore assist the Joint Committee in its functions pursuant to Article 13 of the Agreement,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the third meeting of the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems as regards the adoption of Common Operational Procedures, shall be based on the draft act of the Joint Committee attached to this Decision.

Minor changes to the draft Decision may be agreed to by the representatives of the Union within the Joint Committee without a further decision of the Council.

Article 2

The representatives of the Union within the Joint Committee may agree to technical guidelines to ensure the proper implementation of the Agreement including technical or other matters necessary for the operation of the linking and taking into account the priorities of domestic legislation. To this end, a working group shall be set up pursuant to Article 12(5) of the Agreement that shall assist the Joint Committee in its functions pursuant to Article 13 and in particular Article 13(1) of the Agreement.

Done at Brussels,

For the Council
The President