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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with regard to certain amendments of Articles in that Convention.

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision establishing the Union's position at the Conference of the Parties to the Basel Convention, with respect to the European Union proposal to amend Annex IV of this Convention and of the Russian Federation proposal to amend Article 6 of this Convention. The next meeting is scheduled to take place in May 2023 (16th meeting of the Conference of the Parties). The two proposals mentioned above were already discussed at the 15th meeting of the Conference of the Parties in June 2022. The position of the Union on these proposals for the 15th Conference of the Parties was defined by Council Decisions (EU) 2020/1829 of 24 November 2020 and (EU) 2022/1025 of 2 June 2022. A new Council Decision is needed for the next meetings of the Conference of Parties on these proposals, starting with the 16th meeting of the Conference of the Parties.

2. CONTEXT OF THE PROPOSAL

2.1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') was adopted on 22 March 1989 and entered into force in 1992. The European Union as well as its Member States are Parties to the Convention¹. The Convention has 188 Parties.

The Convention's cornerstone is a control system for the export, import and transit of certain waste, through the procedure of "prior informed consent". Exports of waste subject to the Convention shall be notified in advance to the competent authorities of the States of import and transit. The notifications shall be made in writing and shall contain the declarations and information specified in Annex V A to the Convention. A waste export may only proceed if and when all States concerned have given their written consent (Article 6 of the Convention).

The Convention's control system applies to hazardous waste defined in Article 1 and listed in Annex VIII to the Convention, as well as to waste listed in Annex II, which contains waste collected from households, residues arising from the incineration of household waste and certain plastic wastes. The Convention also lists waste entries in Annex IX which do not fall within its scope and control system unless such waste contains a material belonging to a category in Annex I to an extent causing it to exhibit a hazardous characteristic in Annex III.

2.2. The Conference of the Parties

The Conference of the Parties to the Basel Convention is the principal decision-making body of the Convention. It has powers to amend the Annexes to the Convention and it meets every two years. The fifteenth meeting of the Conference of the Parties to the Basel Convention (COP15) was held in two segments: a first online segment took place from 26 to 30 July 2021 and the face-to-face segment, from 6 to 17 June 2022.

The sixteenth meeting of the Conference of the Parties to the Basel Convention (COP16) will be held in Geneva from 1 to 12 May 2023.

¹ Council Decision 93/98/EEC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, OJ L 39, 16.2.1993, p. 1.

2.3. The proposed amendments to the Convention

Proposed amendment of Annex IV of the Convention by the Union

The review of Annexes to the Convention was initiated by the 12th meeting of the Conference of the Parties (COP-12) by its decision BC-12/1.²

The 13th meeting of the Conference of the Parties (COP-13) decided to establish an expert working group (EWG) for the review of the above annexes.

The EWG has issued a number of recommendations and options for Parties to consider if they wish to submit proposals for COP consideration to amend and clarify the descriptions of disposal operations listed in Annex IV to the Convention. The proposals will, if adopted, result in improved legal clarity and therefore facilitate controls of shipments of waste and the prevention of illegal shipments. They will also support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.

Following Council Decision (EU) 2020/1829 a proposal for the amendment of Annex IV was tabled on behalf of the Union on 3 December 2020, for discussion at COP-15. The proposal aims to improve the implementation of the Basel Convention, in particular through changes to the definitions of waste management operations and wastes to be controlled, contained in the Annexes of the Convention. The proposal was discussed at COP-15 of the Convention in June 2022. During the discussions many Parties considered that some elements of the proposal were problematic, such as the inclusion of “preparing for re-use” as a new waste management operation, the introduction in Annex IV of operations occurring prior to submission to other operations (“interim operations”) and the introduction of a “catch-all” clause for operations not covered by other ones. Therefore, additional discussion at future Conference of the Parties will be needed to progress on this activity.

If amendments to Annex IV of the Convention are agreed by the COP, they will have to be implemented in the EU waste framework Directive 2008/98/EC³ (the list of waste management operations corresponding to Annex IV to the Convention) and possibly Regulation (EC) No 1013/2006⁴.

Proposed amendment of Article 6(2) of the Convention by the Russian Federation

The Russian Federation tabled a proposal for consideration at the 15th meeting of the Conference of the Parties, designed to amend the first sentence of paragraph 2 of Article 6 of the Convention (“the envisaged act”)⁵.

The first sentence of Article 6(2) of the Convention reads as follows: “*The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information*”.

This envisaged act proposes to change this sentence through the addition of a time limit of 30 days within which a country of import should respond to the notifier (to consent to the planned shipment, deny its permission to this shipment, or to request additional information).

² More information is available on the website of the Basel Convention, see <http://www.basel.int/Implementation/LegalMatters/LegalClarity/ReviewofAnnexes/AnnexesI,III,IVandrelatedaspectsofAnnexes/tabid/6269/Default.aspx>

³ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008, p. 3–30.

⁴ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1.

⁵ The proposal is available on the website of the Basel Convention, see <http://www.basel.int/TheConvention/Communications/tabid/1596/Default.aspx>

In addition, the proposal consists in deleting the “,” between “*conditions*” and “*denying*”, to replace the comma with “*or*”.

The Convention is implemented in the Union through Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste (“the WSR” hereafter). Any modifications to the Convention would come into effect in the EU after they have been implemented through amendments of this Regulation.

The current rules applying to the Union and its Member States already foresee a 30 days deadline for the importing country to respond to the notifier (see Article 8 of the WSR). This also applies to other OECD countries, as per the OECD Decision⁶.

For the Union, the only practical consequence of the changes linked to the Russian Federation proposal would relate to the procedure for the export of notified waste to non-OECD countries. As export of Annex VIII and Annex II waste to non-OECD countries is banned under the WSR, the change triggered by the Russian proposal would only relate to “unlisted waste” (i.e. with the Russian proposal, non-OECD countries importing unlisted waste from the EU would have to respond to the notifier within 30 days), which, under Article 3(1)(b)(iii) and (iv) of the WSR, are subject to the procedure of “prior informed consent”. The amendment proposed by the Russian Federation would mean that, for these cases, the importing country would have to respond within 30 days to the notifier of a shipment from the Union destined to a non-OECD country.

A first discussion on the Russian Federation proposal took place at the 15th meeting of the Conference of the Parties. In agreement with the Council Decision (EU) 2022/1025 of 2 June 2022, the Union position did not support such a proposal. Several like-minded Parties also did not support the Russian Federation proposal. However, other Parties expressed support on the proposal.

As a result of the first discussion, the Conference of the Parties decided to postpone the consideration of the Russian proposal to COP16¹:

“Given the discussion under the present sub-item and those under agenda item 4 (a) (i) on the strategic framework with regard to Parties’ interest in considering possible ways of improving the prior informed consent procedure, the Conference of the Parties decided to defer consideration of the proposal by the Russian Federation to amend paragraph 2 of Article 6 of the Convention to the following meeting of the Conference of the Parties”.

Procedures for the amendments of the Convention

The procedure for amending the Convention is governed by Article 17 of the Convention. Any such amendment must be adopted at a meeting of the Conference of the Parties. An amendment becomes binding on those Parties that deposit their instruments of ratification, approval, formal confirmation or acceptance in accordance with Article 17(5) of the Convention, which provides: *“Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the Parties who accepted them or by at least two thirds of the Parties to the protocol concerned who accepted them, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its*

⁶ Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, <https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0266>

instrument of ratification, approval, formal confirmation or acceptance of the amendments". There is therefore a need for a ratification, approval, formal confirmation or acceptance by three quarters of the Parties to the Convention (so 141 Parties) for any amendment of the Convention to enter into force.

So far, the body of the Convention has been amended once, through the addition of an Article 4A and of a subsequent addition of an Annex VII ("the Basel Ban amendment") to the Convention. This amendment was agreed by the Conference of the Parties at its third meeting in 1995 and it entered into force in 2019, for those Parties that have ratified it.

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

Proposed amendment of Annex IV of the Convention by the Union

In line with Council Decision (EU) 2020/1829 of 24 November 2020, the Union submitted a proposal to amend Annex IV and certain entries in Annexes II and IX to the Convention which inter alia contained the following elements:

- Inclusion of a general introduction clearly distinguishing the terms final disposal and recovery, of clarifications that all waste management operations that occur or might occur in practice are covered regardless of their legal status and whether they are considered to be environmentally sound, and that also operations occurring prior to submission to other operations ("interim operations") are covered.
- Inclusion of captions and introductory texts explaining what is meant by non-recovery operations (Annex IVA) and recovery operations (Annex IVB), and
- clarifications on existing operations and introduction of new operations in Annex IV, which would aim, inter alia, to update and clarify the descriptions of operations in line with scientific, technical and other developments since the Convention was adopted in 1989, and ensure by the introduction of catch-all provisions that all operations not specifically mentioned are covered by the Convention's requirements.

The above proposals have the objectives to:

- Ensure that the appropriate control mechanisms of the Convention are fully applicable and would therefore if adopted improve controls of shipments of waste and facilitate the prevention of illegal shipments,
- Improve legal clarity and a common understanding and interpretation of the waste management operations by Parties, and
- Support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.

The Union should continue to support the above-mentioned objectives, but, in consideration of the opposition expressed at COP-15 by many Parties, in particular with regard to the inclusion of new operations, for example, on preparing for reuse and catch-all operations, the Union should display flexibility, including deferring the discussion on the most contentious topics and seeking an agreement on the remaining aspects of the proposal.

If amendments of the relevant annexes are proposed by other Parties, which could achieve the same objectives as those behind the Union's proposal, the Union should show openness to consider these proposals and such proposals could in principle be supported by the Union.

Proposed amendment of Article 6(2) of the Convention by the Russian Federation

The European Union should not support the amendment of paragraph 2 of Article 6 of the Convention as proposed by the Russian Federation. This position is in line with the position agreed for COP-15 by Council Decision (EU) 2022/1025 of 2 June 2022.

The first part of the amendment (30 days time limit for the importing country to respond to the notifier) would not bring any major advantage for the Union and its Member States, as the time limit of 30 days for importing countries to respond to the notifier contained in the proposed amendment already applies to the majority of shipments notified by the EU and its Member States under Union law (with the exception of exports of unlisted waste to non-OECD countries). Neither would it change obligations for the EU and its Member States receiving notifications, as the time limit of 30 days to respond already applies under Union law.

The second part of the amendment (replacing a comma with “or”) does not seem necessary and would create legal uncertainty. The current formulation is sufficiently clear that the importing country can react in three different manners when responding to the notifier (consenting to the movement, denying the permission to this movement, or requesting additional information). There is therefore no need to amend this sentence.

The process relating to amending the Convention is very burdensome and time consuming, especially as it requires each Party to proceed with its internal ratification process and a threshold of three quarters of all Parties to ratify if before the amendment enters into force. This amendment might also in the end have a limited impact, as amendments are only binding on those who have ratified them. The proposed amendment therefore does not address properly any priority for the Union and its Member States for a better effectiveness of the Convention, while launching a lengthy and heavy process within the Convention and for its Parties.

While not supporting the proposed amendments, the Union should stress that Parties should promote a better functioning of the prior informed consent procedure within the framework of the Basel Convention. This could include the establishment of other time limits for responses to notifiers, notably for transit countries, as well as encouraging the use of electronic data interchange systems or incorporating the concept of “pre-consented facilities”, which stems from the OECD Decision on transboundary movements of waste, into the Basel Convention framework. There are a number of processes ongoing in the Convention already on these issues, including one launched on the improvement of the prior informed consent procedure launched at COP-15 at the initiative of the Union. The Union should underline the importance of this process as a solution to a number of issues pertaining to the implementation of the Convention and invite all Parties to participate in this process.

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*’⁷.

4.1.2. *Application to the present case*

The Conference of the Parties to the Basel Convention is a body set up by the Convention.

The acts which the Conference of the Parties is called upon to adopt constitutes acts having legal effects. If adopted, the envisaged acts would be binding under international law in accordance with Article 18 of the Convention and capable of decisively influencing the content of EU legislation, namely Regulation (EC) No 1013/2006 on shipments of waste and Directive 2008/98/EC on waste. This Regulation implements the Convention by, *inter alia*, laying down the procedures for exports from and imports to the Union as well as shipments between Member States.

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 the 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) TFEU, 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 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') entered into force in 1992 and was approved by the Union by Council Decision 93/98/EEC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal⁸.
- (2) Pursuant to Article 15(5)(b) of the Convention, the Conference of the Parties shall consider and adopt, as required, amendments to the Convention.
- (3) The Conference of the Parties, during its 15th meeting in June 2022, considered a proposal for amendments of Article 6(2) of the Convention submitted by the Russian Federation. That proposal aims to establish a 30 days time limit for an importing country to respond to the notifier of a shipment of waste and to include another change presented as editorial. The Conference of the Parties decided to defer consideration of this proposal to the following meeting of the Conference of the Parties.
- (4) A proposal to amend Annex IV and certain entries in Annexes II and IX to the Convention was submitted on the Union's behalf and discussed by the Conference of the Parties, during its 15th meeting in June 2022. The proposal aims inter alia to amend and clarify the descriptions of disposal operations listed in Annex IV to the Convention and, in particular, to: include a general introduction clearly distinguishing the terms 'non-recovery' and 'recovery'; include introductory texts explaining what is meant by 'non-recovery operations' (Annex IVA) and 'recovery operations' (Annex IVB); update and clarify the descriptions of operations in line with scientific, technical and other developments which have occurred since the Convention was adopted in 1989; and ensure, through the introduction of catch-all provisions, that all operations not specifically mentioned are covered by the Convention's requirements. The Conference of the Parties decided to further consider this proposal at the following meeting of the Conference of the Parties.

⁸ OJ L 39, 16.2.1993, p. 1.

- (5) It is necessary to establish the position to be taken on the Union's behalf at the Conference of the Parties on those proposals, as, being amendments to the text and Annexes of the Convention, they have legal effects. If adopted by the Conference of the Parties, the envisaged acts would be binding on the Union and capable of decisively impact the content of Union law, namely Directive 2008/98/EC⁹, and Regulation (EC) No 1013/2006¹⁰.
- (6) With regard to the amendments of Article 6(2) of the Convention submitted by the Russian Federation, the Union should not support them since they would not help addressing the problems that the Union considers as priorities for the functioning of the Basel Convention. In addition, amendments to the body of the Convention text require a long and heavy process to enter into force and it seems disproportionate to launch such process for an amendment, which has very little to no added-value. The Union should rather continue supporting initiatives designed to improve the functioning of the procedure of "prior informed consent", on the conditions that they have a broader scope than the proposal submitted to COP15, are in line with broad Union policies and objectives and do not require an amendment to the Convention.
- (7) With regard to the proposal to amend Annex IV and certain entries in Annexes II and IX, the Union should continue to support its adoption. With a view to gather consensus on this proposal, the Union should also display flexibility, in particular with regard to the proposed measures that are unlikely to gather sufficient support for their adoption at the upcoming Conference of Parties. This includes, for example, deferring the discussion on the most contentious topics (such as preparing for reuse and catch-all operations), seeking an agreement on the remaining aspects of the proposal and supporting possible amendments by other Parties, provided that they could achieve the same objectives as those behind the Union's proposals concerning Annex IV to the Convention.

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf at the meetings of the Conference of the Parties to the Basel Convention is the following:
 - (a) the Union shall not support the amendments to paragraph 2 of Article 6 of the Convention, as submitted by the Russian Federation. The Union shall support initiatives designed to improve the functioning of the procedure of "prior informed consent", on the conditions that they are in line with broad Union policies and objectives and do not require an amendment to the Convention.
 - (b) the Union shall continue supporting the adoption of the amendments to Annex IV and certain entries in Annexes II and IX of the Convention. If this is needed in order to ensure that consensus is found on an amendment of Annex IV, the Union should show flexibility and agree to depart from the proposal tabled at CoP15, as long as the amendment contributes to increase legal clarity of the Annex and to the

⁹ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives, OJ L 312, 22.11.2008, p. 3–30.

¹⁰ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, OJ L 190, 12.7.2006, p. 1.

implementation of the control mechanisms of the Convention, and does not undermine the EU legal regime on the management and shipments of waste.

Article 2

Refinement of the position referred to in Article 1 may be agreed to, in the light of developments at the 16th Conference of the Parties and following meetings of the Conference of the Parties, by representatives of the Union, in consultation with the Member States, during on-the-spot coordination meetings.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*