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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the fourteenth meeting of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals (CMS) as regards proposals from various parties to amend the Appendices 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 14th meeting of the Conference of the Parties to the Convention on the Conservation of Migratory Species of Wild Animals ('the Convention') in connection with the envisaged adoption of decisions concerning the amendment of the Appendices to the 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 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 Convention¹. All Member States are parties to the Convention.

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 I and II 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 the Convention.

The 14th meeting of the Conference of the Parties will take place in Samarkand (Uzbekistan) in early 2024.

2.3. The envisaged acts of the Conference of the Parties

During its 14th meeting, the Conference of the Parties is to adopt decisions regarding amendments of the Appendices to the Convention ('the envisaged acts').

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

In accordance with Article III of the Convention, Appendix I to 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

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, 19.7.1982, p. 10.

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 amendments 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.

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

With regard to the 14th meeting of the Conference of the Parties to the Convention, and in line with Council Decision (EU) 2023/1034 of 22 May 2023², the Union has proposed to amend the Convention as follows:

an amendment to Appendix I to the Convention to include the Baltic Proper population of the harbour porpoise, *Phocoena phocoena*.

Other Parties to the Convention have submitted proposals to amend Appendix I to include the following species and subspecies: *Lynx lynx balcanicus*, *Tursiops truncatus gephyreus*, *Pelecanus thagus*, *Pluvianellus socialis*, Southern African population of *Gypaetus barbatus meridionalis*, *Carcharias taurus*, Mediterranean Sea population of *Glaucostegus cemiculus*, Mediterranean Sea population of *Aetomylaeus bovinus*, Mediterranean Sea population of *Rhinoptera marginata*.

Other Parties to the Convention have submitted proposals to amend Appendix II to include the following species: *Lynx lynx*, *Felis manul*, *Lama guanicoe*, *Tursiops truncatus gephyreus*, *Pelecanus thagus*, *Carcharias taurus*, *Glaucostegus cemiculus*, *Aetomylaeus bovinus*, *Rhinoptera marginata*, *Brachyplatystoma rousseauxii*, *Brachyplatystoma vaillantii*.

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 14th meeting of the Conference of the Parties with regard to all proposals for amendments.

The Union should support all the above-mentioned proposals because they are science-based and in line 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, except for the inclusion of *Carcharias taurus* in Appendix I, the Mediterranean Sea population of *Aetomylaeus bovinus* in Appendix I, and the Mediterranean Sea population of *Rhinoptera marginata* in Appendix I, since the current level of protection in the Union for these species does not satisfy the requirements of Article III(5) of the Convention.

The Eurasian lynx, *Lynx lynx*, is covered by the EU Habitats Directive³. Adding this species to Appendix II, and the subspecies *Lynx lynx balcanicus* to Appendix I to the Convention, should be supported.

² Council Decision (EU) 2023/1034 of 22 May 2023 on the submission, on behalf of the European Union, of a proposal to amend Appendix I to the Convention on the Conservation of Migratory Species of Wild Animals with a view to the fourteenth meeting of the Conference of the Parties, OJ L 139, 26.5.2023, p.47.

³ 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.

The Union is not a range state for the species and subspecies *Tursiops truncatus gephyreus*, *Pelecanus thagus*, *Pluvianellus socialis*, *Gypaetus barbatus meridionalis*, hence adding these species and subspecies to Appendix I to the Convention would not require any change in Union law.

The Union is not a range state for the species *Felis manul*, *Lama guanicoe*, *Tursiops truncatus gephyreus*, *Pelecanus thagus*, hence adding these species to Appendix II to the Convention would not require any action by the Union.

The species *Glaucostegus cemiculus* is strictly protected under the Barcelona Convention⁴. Furthermore, retention on board of fishing vessels of this species is prohibited under Regulation (EU) 1343/2011⁵. Therefore, adding this species to Appendix II to the Convention and adding the Mediterranean Sea population of this species to Appendix I to the Convention should be supported.

The species *Brachyplatystoma rousseauxii* and *Brachyplatystoma vaillantii* occur in the Union only in French Guiana, where Union nature legislation does not apply. Adding these species to Appendix II to the Convention should be supported.

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*’⁶.

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 The Convention for the Protection of the Mediterranean Sea Against Pollution.

⁵ Regulation (EU) No 1343/2011 of the European Parliament and of the Council of 13 December 2011 on certain provisions for fishing in the GFCM (General Fisheries Commission for the Mediterranean) Agreement area and amending Council Regulation (EC) No 1967/2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea. OJ L 347, 30/12/2011, p. 44, Consolidated version of 10/07/2019.

⁶ 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.

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 acts relate to environmental protection.

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 to 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/EEC⁷ and entered into force on 1 November 1983.
- (2) Pursuant to Article XI of the Convention, the Conference of the Parties to the Convention (the ‘Conference of the Parties’) may adopt decisions to amend the Appendices to the Convention.
- (3) The Conference of the Parties, during its fourteenth meeting in early 2024, is to adopt decisions to amend the Appendices to the Convention.
- (4) It is appropriate to establish the position to be taken on the Union's behalf at the meeting of the Conference of the Parties, as the decisions amending the Appendices to the Convention will be binding on the Union.
- (5) The Union submitted a proposal for inclusion of the Baltic Proper population of the harbour porpoise, *Phocoena phocoena*, to Appendix I to the Convention. The Union should support its own proposal. This proposed amendment would not require any change in Union law.
- (6) Other parties submitted proposals regarding the inclusion of *Lynx lynx balcanicus*, *Tursiops truncatus gephyreus*, *Pelecanus thagus*, *Pluvianellus socialis*, Southern African population of *Gypaetus barbatus meridionalis*, *Carcharias taurus*, Mediterranean Sea population of *Glaucostegus cemiculus*, Mediterranean Sea population of *Aetomylaeus bovinus*, Mediterranean Sea population of *Rhinoptera marginata* in Appendix I and regarding the inclusion of *Lynx lynx*, *Felis manul*, *Lama guanicoe*, *Tursiops truncatus gephyreus*, *Pelecanus thagus*, *Carcharias taurus*, *Glaucostegus cemiculus*, *Aetomylaeus bovinus*, *Rhinoptera marginata*, *Brachyplatystoma rousseauxii*, *Brachyplatystoma vaillantii* in Appendix II to the Convention.

⁷ 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, 19.7.1982, p. 10).

- (7) The Union should support all the above-mentioned proposals, because they are science-based, in line with the Union's commitment to international cooperation for the protection of biodiversity in accordance with Article 5 of the UN Convention on Biological Diversity, and in line with decisions taken at the Conference of the Parties to that Convention.
- (8) The proposals to include the species *Carcharias taurus* and the Mediterranean Sea populations of *Aetomylaeus bovinus* and *Rhinoptera marginata* in Appendix I of the Convention would require a change to Union law, since the current level of protection in the Union does not satisfy the requirements of Article III(5) of the Convention. Therefore, the Commission, on behalf of the Union, is to enter a reservation pursuant to Article XI(6) of the Convention with regard to the inclusion of these species in Appendix I.

HAS ADOPTED THIS DECISION:

Article 1

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

- (1) to support the addition to Appendix I of the following species or subspecies:
 - (1) *Lynx lynx balcanicus*
 - (2) *Pelecanus thagus*
 - (3) *Pluvianellus socialis*
 - (4) Southern African population of *Gypaetus barbatus meridionalis*
 - (5) Baltic Proper population of *Phocoena phocoena*
 - (6) *Tursiops truncatus gephyreus*
 - (7) Mediterranean Sea population of *Glaucostegus cemiculus*
- (2) to support the addition to Appendix I of the following species, subject to the entry of a reservation by the Commission on behalf of the Union:
 - (1) *Carcharias taurus*
 - (2) Mediterranean Sea population of *Aetomylaeus bovinus*
 - (3) Mediterranean Sea population of *Rhinoptera marginata*
- (3) to support the addition to Appendix II of the following species:
 - (1) *Lynx lynx*
 - (2) *Felis manul*
 - (3) *Lama guanicoe*
 - (4) *Tursiops truncatus gephyreus*
 - (5) *Pelecanus thagus*
 - (6) *Carcharias taurus*
 - (7) *Glaucostegus cemiculus*
 - (8) *Aetomylaeus bovinus*

- (9) *Rhinoptera marginata*
- (10) *Brachyplatystoma rousseauxii*
- (11) *Brachyplatystoma vaillantii*

Article 2

Refinement of the position referred to in Article 1 may be agreed to, in the light of developments at the fourteenth meeting of the Conference of the Parties on the Conservation of Migratory Species of Wild Animals, by the representatives of the Union, in consultation with Member States during on-the-spot coordination meetings, without a further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*