



Brussels, 31.5.2018
COM(2018) 359 final

2018/0192 (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 regarding the adoption of its Rules of Procedure

(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 its rules of procedure.

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, expanding the opportunities for climate change mitigation. The Agreement was signed on 23 November 2017. It will enter into force on the 1 January following the exchange of the instruments of ratification or approval by the Parties. However, the Agreement provides that its Articles 11 to 13 apply on a provisional basis from the date of signature of the Agreement.

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 by representatives of the Parties (the EU and Switzerland). Decisions taken by the Joint Committee shall be agreed by both Parties.

2.3. The envisaged act of the Joint Committee

On 27 June 2018, during its first meeting, the Joint Committee is to adopt its rules of procedure.

The purpose of the envisaged act is to set the rules under which the Joint Committee should function and develop its tasks.

Article 12 (4) of the Agreement provides that the Joint Committee shall adopt its rules of procedure.

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

The proposal determines the Union position as regards the adoption of the rules of procedure that will govern the Joint Committee. The draft rules of procedure contain standard provisions regulating the functioning of the body: its composition, chairmanship and secretarial functions, rules on the meetings to be held, agenda setting, decision making, etc. It also provides for the possibility to create working groups, in accordance with Article 12 (5) of the Agreement.

The adoption of the rules of procedure of the Joint Committee is necessary for it to start working on the preparations to implement the Agreement. This will allow undertaking the practical arrangements to make the link between the two emissions trading systems a reality.

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. For the purposes of ensuring the continued compatibility between the EU ETS and the Swiss ETS the Joint Committee should start working on its implementation.

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'*¹.

4.1.2. Application to the present case

The Joint Committee is a body set up by an agreement, namely 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 has legal effects because it will determine the rules applicable to the Joint Committee, which is the body which administers the Agreement, and can make decisions on the adoption of new annexes or on the amendment of existing ones.

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

¹ 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.

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 191 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 191 TFEU, in conjunction with Article 218(9) TFEU.

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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 191, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement between the Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ('the Agreement') was signed on 23 November 2017.
- (2) Pursuant to Article 22 of the Agreement, before the entry into force of the Agreement, Articles 11 to 13 are to be applied on a provisional basis as from the date of the signature of the Agreement.
- (3) Pursuant to Article 12 of the Agreement, the Joint Committee, during its first meeting on 27 June 2018, is to adopt its rules of procedure.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the rules of procedure will determine the functioning of this body responsible for administering the Agreement and ensuring its implementation.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the first meeting of the Joint Committee established by the Agreement between the Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems regarding the adoption of its Rules of Procedure shall be based on the draft Decision of the Joint Committee attached to this Decision.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*