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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union, in the thirty-eighth meeting of the Standing Committee of the Convention on the conservation of European wildlife and natural habitats, with regards to amendments to Appendices II and III

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

The present proposal concerns the decision establishing the position to be adopted on behalf of the Union in view of the thirty-eighth annual meeting of the Standing Committee of the Convention on the conservation of European wildlife and natural habitats, Strasbourg, France, 27-30 November, 2018, in connection with the envisaged adoption by the Standing Committee of a decision concerning two amendments of Appendix II and Appendix III to the Convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on the conservation of migratory species of wild animals

The 1979 Convention on the conservation of European wildlife and natural habitats (Bern Convention) ("the Agreement") aims to conserve European wild flora and fauna and their natural habitats, especially those whose conservation requires the co-operation of several States. It is an intergovernmental treaty, concluded under the aegis of the Council of Europe. The Agreement entered into force on 1 June 1982. The European Community is a Contracting Party to this Agreement since 1 September, 1982¹. At present, there are 51 Contracting Parties to the Agreement, including all EU Member States.

2.2. The Standing Committee

The Standing Committee is the decision-making organ of the Convention having powers to assess the conservation status of species and, subsequently, to review the listing of them in the Appendices to the Convention. Its functions are enumerated in Articles 13-15 of the Agreement. It meets at least every two years and whenever a majority of the Contracting Parties so request. It has become customary for the Standing Committee to meet every year.

The Union's position concerning amendments of the appendices is established by a decision of the Council based on a proposal from the Commission..

2.3. The envisaged act of the Standing Committee

On 27-30 November, 2018, the thirty-eighth annual meeting of the Standing Committee of the Agreement, in Strasbourg, France, is expected to adopt a decision regarding two amendments of Appendix II and Appendix III to the Agreement ('the envisaged act').

In accordance with Article 17 of the Agreement, an amendment to the Appendices shall be adopted by two-thirds majority of the Contracting parties. It enters into force for all Parties three month after the adoption by the Standing Committee unless one-third of the Contracting Parties have notified objections. Any amendment enters into force for those Contracting Parties which have not notified objections.

The purpose of the envisaged act is to amend Appendix II and Appendix III to the Agreement, as provided for in Article 17 of the Agreement.

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

The following two amendments of the appendices of the Agreement have been proposed.

¹ Council Decision 82/72/EEC of 3 December 1981 on the conclusion on behalf of the Community of the Convention on the Conservation of European Wildlife and Natural Habitats, OJ L 38, 10.2.1982, p. 1.

1) Switzerland has proposed to lower the level of protection for the Wolf (*Canis lupus*) by moving it from Appendix II (strictly protected fauna species) to Appendix III (protected fauna species – regulation is possible).

The justification by Switzerland for the proposal is that the number of Wolves in Europe has increased substantially since the Convention entered into force and therefore no longer requires a strict level of protection. This amendment would allow the management and control of Wolves (also through hunting) without the need to issue exceptions under Article 9 of the Convention. The level of protection would thus be lower for all the populations of Wolves across the territory covered by the parties to the Convention, irrespective of their conservation status and the trends in their populations. The Swiss proposal would effectively lead to this lowest common denominator for the conservation of wolf populations across Europe and is not in line with the current legal protection status of the Wolf under the Habitats Directive.

According to a recent study², out of the nine mainly trans-boundary wolf populations in the Union and its neighbouring countries, only three are of 'least concern' while six are 'vulnerable' or 'near threatened'. The Western-Central Alps population covering Switzerland is 'vulnerable' in the IUCN Red List Assessment.

Whilst acknowledging the challenges of coexistence between wolves and people arising from their recovery in numbers and range, the current proposal of Switzerland to lower the protection status of the Wolf across Europe is not justified from a scientific and conservation point of view.

Any proposal to change the legal protection status of the Wolf in Europe should be based on a full assessment of its implication for the conservation status of the Wolf across Europe. Available information shows that in most EU Member States, particularly in those where it is strictly protected, the species is still in unfavourable conservation status.

Moreover, in 2019 the EU Member States will provide up-to-date reports on the conservation status of the Wolf, as required by Article 17 of the Habitats Directive. Therefore, the Union should defer to establish a position concerning this amendment proposal until such information becomes available.

2) Norway submitted a proposal to move the Barnacle Goose (*Branta leucopsis*) from Appendix II (strictly protected fauna species) to Appendix III (protected fauna species – regulation is possible). The justification in support of the proposal is that the total population size of the Barnacle Goose has multiplied over ten times from the 1980 to 2010 (from 110,000 to 1,319,000), among others as a result of the intensification of agriculture that has made available large quantities of feed. Therefore, the species is no longer in need of strict protection throughout its range.

This proposal is not in line with the current legal protection status of Barnacle Goose under the Birds Directive as it is not listed in its Annex II (hunnable species). The species is listed in Annex I of the Birds Directive (i.e. requiring designation of Special Protection Areas).

A draft Single Species Management Plan for the Barnacle Goose is being prepared under the auspices of the African-Eurasian Waterbird Agreement (AEWA) to address the very rapid population increase, particularly the resulting problems caused by the species (agricultural damage and risks to air safety). The Plan would provide a framework for assisting the decision-making process in range states concerning the application of derogations, including a regular assessment of the cumulative impact of derogations, monitoring of the status of the

² http://www.europarl.europa.eu/cmsdata/152040/AGRI%20NEWS%20Issue10_2018_29%20August.pdf

population as well as the evolution of agricultural damage or risks to air safety. It would facilitate the sharing of information and potentially the co-ordination of derogation measures among range states to increase their efficiency and avoid unintended effects at flyway level. The Plan is to be adopted at the Seventh Meeting of the Parties of the Agreement in December 2018.

The Union should support the Norwegian amendment proposal to address the very rapid population increase of this species, particularly the resulting problems caused by the species (agricultural damage and risks to air safety), so that the non-EU parties to the Convention can apply population management measures, including hunting of this species as needed. However, since an amendment of the Annexes of the Birds Directive is currently not foreseen or possible within the short time frame required by the Convention (90 days), the Union will have to indicate that, for the time being, it will apply stricter protection measures, as provided for in Article 12 of the Convention.

It is therefore necessary for the Council to take a decision for the purpose of establishing the positions to be adopted on behalf of the Union with a view to the thirty-eighth meeting of the Standing Committee with regard to the above proposals for amendments.

The subject matter of the envisaged decision of the Standing Committee concerns an area of EU exclusive external competence pursuant to Article 3(2) TFEU since it falls within an area already largely covered by internal common rules (i.e. the Habitats and the Birds Directives)."

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 Standing Committee is a body set up by the Agreement.

The act which the Standing 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 6 of the Agreement. The envisaged act does not supplement or amend the institutional framework of the agreement.

The procedural legal basis for the proposed decision, therefore, is 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.

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 192(1).

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Standing Committee will amend Appendices II and III of the Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its 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 European wildlife and natural habitats (Bern Convention) ('the Agreement') was concluded by the Union by Council Decision 82/72/EEC⁴ and entered into force on 1 September 1982.
- (2) Pursuant to Article 17 of the Agreement, the Standing Committee may adopt a decision to amend the appendices to the Agreement.
- (3) The Standing Committee, during its thirty-eighth meeting on 27-30 November, 2018, is to adopt a decision on amending Appendix II and Appendix III to the Agreement.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Standing Committee, as the decision will be binding on the Union.
- (5) Norway submitted a proposal to move the Barnacle Goose (*Branta leucopsis*) from Appendix II on "Strictly protected fauna species" to Appendix III on "Protected fauna species" of the Agreement.
- (6) The most recent available scientific information on the size, distribution and threats of the barnacle goose populations shows that its total population has grown over 10 times from the 1980s to 2010 and are now in secure conservation status.
- (7) The Union should support this proposal so to address the very rapid population increase of this species across its range. However, the proposal is not in line with the current protection status of Barnacle Goose under Directive 2009/147 of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds. As an amendment of the Annexes of this Directive is currently not foreseen or possible within the short time frame required by the Convention (90 days), the Union will for the time being apply stricter protection measures, as provided for in Article 12 of the Agreement.
- (8) Switzerland submitted a proposal to move the Wolf (*Canis lupus*) from Appendix II on "Strictly protected fauna species" to Appendix III on "Protected fauna species" of the Agreement.

⁴ OJ L 38, 10.2.1982, p. 1.

- (9) Lowering the protection status of the wolf populations to the lowest common denominator is not justified from a scientific and conservation point of view. The most recent available scientific information on the size, distribution and threats to the European wolf populations shows that, out of the nine mainly trans-boundary wolf populations in the Union and its neighbouring countries, only three are of 'least concern' while six are 'vulnerable' or 'near threatened'. The Western-Central Alps population covering Switzerland is 'vulnerable' in the IUCN Red List Assessment.
- (10) Up-to-date information on the conservation status of the Wolf in the Union will become available in 2019 from the Article 17 reports under the Habitats Directive. Therefore, the Union should seek to defer a vote of the Standing Committee on the Swiss proposal until such information is available.

(11)

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the thirty-eighth meeting of the Standing Committee of the Convention on the conservation European wildlife and natural habitats, shall be the following:

- to support the proposal to move the Barnacle Goose (*Branta leucopsis*) from Appendix II on “Strictly protected fauna species” to Appendix III on “Protected fauna species” thereto. The Union will, for the time being, apply stricter protection measures for this species, as provided for in Article 12 of the Agreement.
- to seek the support of the other contracting parties to the Convention to defer voting on the proposal to move the Wolf (*Canis lupus*) from Appendix II on “Strictly protected fauna species” to Appendix III on “Protected fauna species” until up-to-date information on the conservation status of the Wolf in the Union becomes available.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*