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| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
| date of receipt: | 16 December 2020 |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
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| Subject: | Proposal for a COUNCIL DECISION on the submission, on behalf of the European Union, of a proposal for an Executive Body decision regarding the methodology for adjustments to reflect changes in the membership of the European Union, with a view to the 41st session of the Executive Body under the Convention on Long-Range Transboundary Air Pollution, and on the position to be taken on behalf of the European Union in this session |

Delegations will find attached document COM(2020) 801 final.

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Brussels, 15.12.2020
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2020/0355 (NLE)

Proposal for a

COUNCIL DECISION

on the submission, on behalf of the European Union, of a proposal for an Executive Body decision regarding the methodology for adjustments to reflect changes in the membership of the European Union, with a view to the 41st session of the Executive Body under the Convention on Long-Range Transboundary Air Pollution, and on the position to be taken on behalf of the European Union in this session

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal for a Council Decision concerns the submission, on behalf of the European Union, of a proposal for an Executive Body decision on the methodology for adjustments to tables 2-6 of Annex II to the Protocol to Abate Acidification, Eutrophication and Ground-level Ozone (the ‘Gothenburg Protocol’), as amended 2012, under the Convention on Long-Range Transboundary Air Pollution (the ‘Air Convention’), to account for changes in the membership of the European Union. The proposal for the Executive Body decision would be submitted with a view to the 41st session of the Executive Body of the Air Convention.

This proposal for a Council Decision also covers the negotiating position of the European Union regarding the Executive Body decision vis-à-vis comments by other parties on the EU submission.

2. CONTEXT OF THE PROPOSAL

2.1. The Air Convention and the Gothenburg Protocol (as amended 2012)

The Air Convention, adopted in 1979, is the most advanced regional environmental agreement addressing air quality and air pollution.

Under the Air Convention, the original Gothenburg Protocol was agreed in November 1999. The Gothenburg Protocol was amended in 2012. The amended version entered into force on 7 October 2019. The amended Protocol formed the basis for the emission reduction commitments from 2020 to 2029 under Directive (EU) 2016/2284 on the reduction of national emissions of certain atmospheric pollutants that repealed Directive 2001/81/EC on national emission ceilings.

The European Union is a Party to the Air Convention¹ and to the Gothenburg Protocol as amended in 2012². All Member States are Parties to the Air Convention; 21 Member States are Parties to the original Gothenburg Protocol³ and 17 Member States have to date accepted the 2012 amendment to the Gothenburg Protocol⁴.

2.2. The Executive Body of the Air Convention

The Executive Body is the governing body of the Air Convention and is composed of representatives of Parties to the Convention. Pursuant to Article 10 of the Air Convention, the Executive Body shall review the implementation and development of the Air Convention and its Protocols.

¹ 81/462/EEC: Council Decision of 11 June 1981 on the conclusion of the Convention on long-range transboundary air pollution, OJ L 171, 27.6.1981, p. 11–24.

² 2003/507/EC: Council Decision of 13 June 2003 on the accession of the European Community, to the Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, OJ L 179, 17/07/2003 P. 0001 – 0002; Council Decision (EU) 2017/1757 of 17 July 2017 on the acceptance on behalf of the European Union of an Amendment to the 1999 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone, OJ L 248, 27.9.2017, p. 3–75.

³ Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden (status of ratifications on 1 October 2020).

⁴ Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovakia, Spain and Sweden (status of ratifications on 1 October 2020).

The Executive Body aims to reach its decisions by consensus.⁵

2.3. The envisaged act of the Executive Body

The European Union and its Member States should submit a proposal for an Executive Body decision establishing the methodology for adjustments to tables 2-6 of Annex II to the Gothenburg Protocol, as amended 2012, to account for changes in the membership of the European Union ('the envisaged act').

The purpose of the envisaged act is to ensure that compliance reviews under the amended Protocol are made on the basis of correct numbers for the European Union. Tables 2-6 of Annex II list the Member States' national emission levels 2005 (baseline) and national emission reduction commitments as from 2020 and beyond per pollutant (for sulphur dioxide, nitrogen oxides, ammonia, volatile organic compounds and fine particulate matter). All tables also include a row showing the EU totals (the sum of the EU Member States' baselines in kilotonnes of emissions in 2005; and the sum of the reduction commitments of the EU Member States expressed as the total % change compared to the sum of the EU Member States' baselines). At present, the EU value in these tables is the sum of the EU27(2013), which reflects the membership of the European Union at the time of the Protocol amendment in 2012. Annex II therefore requires a correction.

The current rules do not yet provide the methodology for this specific case of technical adjustment, as was concluded by the Executive Body at its 36th session. A similar Executive Body decision regarding the possibility to adjust the European Union emission ceilings in the original Gothenburg Protocol was adopted in 2017⁶, following a proposal by the European Union upon request by the Executive Body in its 36th session. As the amended Gothenburg Protocol had not yet entered into force at that time, it was not covered by the 2017 Executive Body decision.

An Executive Body decision on the methodology of adapting the values of the European Union in Tables 2 to 6 of Annex II to the amended Gothenburg Protocol needs to be adopted preferably at the tentative additional Executive Body session in May 2021 and at the latest during the Executive Body session in December 2021 so that the adjustment of the tables can be requested before the start of the first compliance review of 2020 data (expected for Q2 2022).

The envisaged act will apply as from the time of the adoption of the Executive Body decision. The envisaged act will, once adopted, allow the European Union to submit the technical updates required to reflect changes in the membership of the European Union. The task of submitting the adjustments to account for membership changes to the Air Convention Secretariat will be completed by the Commission on behalf of the European Union.

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

The European Union should submit a proposal for a decision to be adopted by the Air Convention Executive Body (see draft submission in Annex I).

The objective of this proposal is to adopt a methodology to enable technical adjustments of the European Union emission baselines and emission reduction commitments in tables 2-6 of Annex II to the amended Gothenburg Protocol, to ensure that the European Union values in

⁵ Rules of procedure for sessions of the Executive Body for the Convention on Long-range Transboundary Air Pollution as adopted by decision 2010/19 and amended by decision 2013/1, Rule 29.

⁶ Executive Body Decision 2017/3, https://www.unece.org/fileadmin/DAM/env/documents/2017/AIR/EB/EB_Decisions_2017_3-E.pdf

these tables correctly reflect the sum of its Member States' emission baselines and emission reduction commitments, following changes in the membership of the European Union. The possibility to adjust these tables in the specific circumstance of changes in the membership of the European Union is necessary for the sake of correct compliance review of the European Union obligations under the amended Gothenburg Protocol.

If other Parties propose drafting changes to the proposed Executive Body decision which could achieve the same objectives as those pursued by the European Union's proposal, such proposals could in principle be supported by the European Union.

Proposals to adjust the national emission ceilings or national emission reduction commitments of Member States (political impact) will not be supported but will be referred to a separate discussion, notably with regard to the ongoing review of the amended Gothenburg Protocol.

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 Executive Body is a body set up by an agreement, namely the Air Convention.

The act, which the Executive Body is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 13 (5) of the amended Gothenburg Protocol.

The envisaged act does not supplement or amend the institutional framework of the Air Convention or of the Gothenburg Protocol.

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 European 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 environment.

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.

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

N/a

Proposal for a

COUNCIL DECISION

on the submission, on behalf of the European Union, of a proposal for an Executive Body decision regarding the methodology for adjustments to reflect changes in the membership of the European Union, with a view to the 41st session of the Executive Body under the Convention on Long-Range Transboundary Air Pollution, and on the position to be taken on behalf of the European Union in this session

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 Protocol to Abate Acidification, Eutrophication and Ground-level Ozone in amended version adopted 2012 ('the amended Gothenburg Protocol') under the Convention on Long-Range Transboundary Air Pollution ('the Air Convention') was approved by the European Union by Council Decision (EU) 2017/1757 and entered into force on 7 October 2019.
- (2) Pursuant to Article 10 of the Air Convention, the Executive Body shall review the implementation and development of the Air Convention and its Protocols and may adopt decisions to clarify the implementation of these Protocols.
- (3) In the 36th session of the Executive Body to the Air Convention, the Parties to the Convention called upon the European Union and its Member States to propose a methodology for adjusting the European Union emission ceilings in table 1 of Annex II to the original Gothenburg Protocol (version adopted 1999), to account for changes in the membership of the European Union;
- (4) In the 37th session of the Executive Body to the Air Convention, the decision subsequently proposed by the European Union and its Member States was adopted⁸.
- (5) The methodology for adjusting the European Union values in tables 2-6 of Annex II to the amended Gothenburg Protocol to account for changes in the membership of the European Union is required to enable European Union membership changes to be correctly reflected in view of the review of European Union compliance with the obligations under the amended Gothenburg Protocol. This does not relate to any adjustment of national emission ceilings or national emission reduction commitments in the same tables.
- (6) Once the methodology for adjustments is adopted by the Executive Body, the Commission should submit on behalf of the European Union the necessary adjustments to the Executive Secretary of the United Nations Economic Commission

⁸ Decision 2017/3 of the Executive Body to the Air Convention, https://www.unece.org/fileadmin/DAM/env/documents/2017/AIR/EB/EB_Decisions_2017_3-E.pdf

for Europe implementing that methodology, to account for the changes in the membership of the European Union since the time of adoption of the amended Gothenburg Protocol and similarly submit any adjustments required in case of subsequent changes in the membership of the European Union.

- (7) It is appropriate to establish the position to be taken on the European Union's behalf in the Executive Body as the decision of the Executive Body will be binding on the European Union.

HAS ADOPTED THIS DECISION:

Article 1

1. At the 41st session of the Executive Body to the Air Convention, the European Union shall pursue the following objective: to establish the methodology to enable adjustments of the European Union emission baselines and emission reduction commitments in tables 2-6 of Annex II to the amended Gothenburg Protocol, to ensure that the European Union values in these tables can be adjusted to correctly reflect the total sum of its Member States' emission baselines and emission reduction commitments, following changes in the membership of the European Union.
2. With a view to the 41st session of the Executive Body to the Air Convention, and in order to achieve the objective defined in paragraph 1, the European Union shall submit the proposal for the required adjustment methodology which is Annexed to this Decision.
3. The Commission, on behalf of the European Union, shall communicate that proposal to the Secretariat to the Convention.

Article 2

The European Union may support amendments proposed by other Parties to the Convention provided they contribute to achieving the European Union's objectives as listed in Article 1.

Article 3

Refinement of the position referred to in Articles 1 and 2 may be agreed to, in the light of developments at the 41st session of the Executive Body to the Air Convention, by representatives of the European Union, in consultation with the Member States, during on-the-spot coordination meetings, without a further decision of the Council.

Article 4

Once the methodology to enable these adjustments has been adopted by the Executive Body to the Air Convention, the Commission shall submit, on behalf of the European Union, the necessary adjustments implementing that methodology.

Article 5

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*