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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the fortieth meeting of the Standing Committee of the Convention on the Conservation of European Wildlife and Nature Habitats (Bern Convention)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision establishing the position to be taken on the Union's behalf in the fortieth meeting of the Standing Committee of the Convention on the conservation of European wildlife and natural habitats, Strasbourg, France, 1-4 December 2020, in connection with the envisaged adoption by the Standing Committee of two decisions concerning amendment of the Convention, and establishment of an enlarged partial agreement.

2. CONTEXT OF THE PROPOSAL

2.1. The Convention on the conservation of European wildlife and natural habitats (Bern Convention)

The Convention on the conservation of European wildlife and natural habitats ("the Convention") 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 Convention entered into force on 1 June 1982.

The European Union is a Contracting Party to this Convention since 1 September, 1982¹. At present, there are 51 Contracting Parties to the Convention, including all EU Member States.

2.2. The Standing Committee

The Standing Committee is the decision-making organ of the Convention. It is responsible for following the application of the Convention. Its functions are enumerated in Articles 13 to 15 of the Convention. 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.

In accordance with Article 16 of the Convention, an amendment to Articles 13 to 24 of the Convention shall be adopted by a three-quarters majority of the Parties in the Standing Committee, after which it shall be submitted to the Committee of Ministers for approval.

In accordance with Article 14 of the Convention, the Standing Committee may make proposals for improving the effectiveness of the Convention. Consequently, the Standing Committee may decide to propose to the Committee of Ministers the adoption of an Enlarged Partial Agreement for improving the application of the Convention. In accordance with rule 8b of the Rules of Procedure, this decision of the Standing Committee shall be taken by a two-third majority of the votes cast.

2.3. The envisaged act of the Standing Committee

On 1-4 December 2020, in Strasbourg, France, during its fortieth meeting, the Standing Committee is expected to adopt decisions regarding:

- Amendment of the Convention to introduce financial clauses ('the first envisaged act') and
- Establishment of an Enlarged Partial Agreement on the Fund for the implementation of the Convention on the Conservation of European Wildlife and Natural Habitats ('the second envisaged act').

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.

The purpose of the first envisaged act is to amend the Convention to introduce a financial mechanism whereby the Standing Committee would determine a scale of obligatory financial contributions from Parties to complement the ordinary budget allocation of the Council of Europe.

In accordance with Article 16 of the Convention, the first envisaged act shall enter into force for all Parties after approval by the Committee of Ministers and subsequently on the thirtieth day after all the Contracting Parties have notified acceptance.

The purpose of the second envisaged act is to strengthen intergovernmental cooperation for the implementation of the Bern Convention, including through establishment of an obligatory financial contribution for the parties to the Enlarged Partial Agreement.

In accordance with Article 20.d of the Statute of the Council of Europe and Article 2 of the Guide of the Committee of Ministers of the Council of Europe on Procedures and Working Methods, following the decision by the Standing Committee, the second envisaged act shall enter into force for all Parties to the Enlarged Partial Agreement after adoption by the Committee of Ministers by a two-thirds majority of the Representatives casting a vote and a majority of the Representatives entitled to sit on the Committee of Ministers, and subsequently after a threshold of signatories is achieved. Unless otherwise decided by the Committee of Ministers, the minimum membership threshold is fixed at one third of the Member States of the Council of Europe, which at present would consist of 16 countries.

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

In accordance with Resolution No. 9 (2019) of the thirty-ninth meeting of the Standing Committee, adopted on 6 December 2019, on the financing of the Bern Convention on initiating the establishment of a new system of obligatory financial contributions by Parties, an inter-sessional expert working group was established to assist the Secretariat to present proposals for the inclusion of financial clauses by amending the articles of the Bern Convention and for the establishment of an Enlarged Partial Agreement, for consideration at the fortieth meeting of the Standing Committee.

The ordinary allocation of the Council of Europe to the Bern Convention has progressively decreased over the years to the point that the functions of the Bern Convention cannot be assured without substantial voluntary contributions by the parties, which are also in decline. It is therefore essential to establish a reliable source of finance for the Convention.

The proposal to amend the Convention to include a mechanism to establish an obligatory contribution aligns with provisions of most multilateral environmental agreements, so should be supported in principle. Nevertheless, in the context of other multilateral environmental agreements, there is normally a distinction between the core budget and the programmatic budget, with only the former subject to obligatory contributions. The proposed amendment to the Convention does not clarify that the mechanism to be established would follow this precedent. Neither does the proposed amendment specify the scale of contributions to be applied. The Union should therefore not support the amendment in its present format, but favour a postponement of the vote on this issue to allow a period of negotiation to refine the text of the proposed amendment in order ensure clarity on these matters.

Considering the length of time required for the proposed amendment to be negotiated and enter into force, a more immediate solution is also required. The Union should therefore support the proposal to establish an Enlarged Partial Agreement, to allow those Parties and

non-members who so wish to accede to this agreement and thereby support activities related to implementation of the Convention.

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’*².

4.1.2. Application to the present case

The Standing Committee is a body set up by the Convention.

The acts which the Standing Committee is called upon to adopt constitute acts having legal effects. The envisaged acts will be binding under international law in accordance with Article 6 of the Convention.

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.

4.2. 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 Article 192(1) TFEU.

4.3. Conclusion

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

² 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.

5. PUBLICATION OF THE ENVISAGED ACT

As the envisaged acts of the Standing Committee require further approval by the Committee of Ministers, it is not 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 European wildlife and natural habitats ('the Convention') was concluded by the Union by Council Decision 82/72/EEC³ and entered into force on 1 September 1982.
- (2) Pursuant to Article 16 of the Convention, the Standing Committee may adopt amendments to the Convention for submission to the Committee of Ministers for approval.
- (3) Pursuant to article Article 14 of the Convention, whereby the Standing Committee of Contracting Parties to the Bern Convention is responsible for following the application of the Convention, and may in particular make any proposals for improving the effectiveness of the Convention, the Standing Committee may decide to propose to the Committee of Ministers the establishment of an Enlarged Partial Agreement for improving the application of the Convention.
- (4) The Standing Committee, during its fortieth meeting on 1-4 December 2020, is to adopt decisions on amendment of the Convention to introduce financial clauses and on establishment of an Enlarged Partial Agreement on the Fund for the implementation of the Convention on the Conservation of European Wildlife and Natural Habitats.
- (5) It is appropriate to establish the position to be taken on the Union's behalf in the Standing Committee, as its decisions will be binding on the Union.
- (6) The Secretariat has presented a proposal to amend the Convention to introduce a financial mechanism whereby the Standing Committee would determine a scale of obligatory financial contributions from Parties to complement the ordinary budget allocation of the Council of Europe.
- (7) In accordance with Article 16 of the Convention, this amendment shall enter into force for all Parties after approval by the Committee of Ministers and subsequently on the thirtieth day after all the Parties have notified acceptance.
- (8) The Secretariat has also presented a proposal to strengthen intergovernmental cooperation for the implementation of the Bern Convention through establishment of

³ OJ L 38, 10.2.1982, p. 1.

an Enlarged Partial Agreement, which would include an obligatory financial contribution for the parties to the Enlarged Partial Agreement.

- (9) In accordance with Article 20.d of the Statute of the Council of Europe and Article 2 of the Guide of the Committee of Ministers of the Council of Europe on Procedures and Working Methods, following a decision by the Standing Committee, the proposed Enlarged Partial Agreement shall come into force for all Parties to the Enlarged Partial Agreement after adoption by the Committee of Ministers by a two-thirds majority of the Representatives casting a vote and a majority of the Representatives entitled to sit on the Committee of Ministers, and subsequently after a threshold of signatories is achieved.
- (10) There is a pressing need to establish a secure and reliable source of finance for the functioning of the Bern Convention, considering the decrease in finance provided through the ordinary contribution of the Council of Europe, as well as the decrease in voluntary contributions by Parties.
- (11) An amendment of the Convention to introduce a financial mechanism aligns with how other multilateral environmental agreements are financed and would ensure a fair contribution by all Parties to the Convention. However, the proposed text for amendment of the Convention leaves uncertainty with regards to the financial mechanism to be established, particularly with regard to the distinction between core and programmatic budgets, and with regard to the level of contributions to be required.
- (12) Support for an amendment of the Convention to introduce a financial mechanism must follow the procedure set out in Article 218, paragraphs 2 to 4 of the Treaty.
- (13) The length of time required for negotiation and entry into force of an amendment to the Convention indicates the need for a more immediate solution, which would be met through the proposed Enlarged Partial Agreement.
- (14) Enlarged Partial Agreements are not international treaties per se, but a form of co-operation within the Council of Europe.
- (15) In view of treaty obligations for loyal cooperation, those Member States which become party to the Enlarged Partial Agreement would be bound to ensure that the application of this agreement would align with Union interests in the context of the Bern Convention,

HAS ADOPTED THIS DECISION:

Article 1

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

- To propose a motion to postpone the vote on the proposal to amend the Convention until the forty-first meeting of the Standing Committee;
- To support the proposal to establish an Enlarged Partial Agreement.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*