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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the thirty-ninth 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 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 thirty-ninth annual meeting of the Standing Committee of the Convention on the conservation of European wildlife and natural habitats, Strasbourg, France, 3-6 December 2019, 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 European wildlife and natural habitats

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 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 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 17 of the Convention, an amendment to the Appendices shall be adopted by two-thirds majority of the Contracting Parties.

2.3. The envisaged act of the Standing Committee

On 3-6 December 2019, the thirty-ninth annual meeting of the Standing Committee of the Convention, in Strasbourg, France, is expected to adopt a decision regarding amendments of Appendix II and Appendix III to the Convention ('the envisaged act').

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

In accordance with Article 17 of the Convention, the envisaged act shall enter into force for all Parties three months 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.

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

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 1980s to 2010 (from 112,000 to

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.

1,319,000), including as a result of the intensification of agriculture that has made available large quantities of feed². Therefore, the species is no longer in need of strict protection throughout its range.

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 Birds Directive). 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 in the thirty-ninth meeting of the Standing Committee with regard to the envisaged act.

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 was adopted at the 7th Meeting of the Parties of the African-Eurasian Waterbird Agreement (AEWA) in December 2018 to address the very rapid population increase, particularly the resulting problems caused by the species (agricultural damage and risks to air safety). The Plan 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 population as well as the evolution of agricultural damage or risks to air safety. It should 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 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.

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

² *International Single Species Management Plan for the Barnacle Goose*, AEWA Technical Series No. 70, Dec. 2018, www.unep-awea.org/sites/default/files/publication/ts70_issmp_barnacle%20goose_complete.pdf, p. 13.

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 Convention.

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 Convention.

The envisaged act does 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 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 Convention, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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.

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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/EEC⁴ and entered into force on 1 September 1982.
- (2) Pursuant to Article 17 of the Convention, the Standing Committee may adopt amendments to the appendices to the Convention.
- (3) The Standing Committee, during its thirty-ninth meeting on 3-6 December 2019, is to adopt a decision on the proposed amendments to Appendix II and Appendix III to the Convention.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Standing Committee, as its decision will be binding on the Union.
- (5) Norway submitted a proposal to move *Branta leucopsis* from Appendix II to Appendix III to the Convention.
- (6) In view of the very rapid population increase of this species across its range, the Union should support this proposal. However, the proposal is not aligned with the current protection status of *Branta leucopsis* under Directive 2009/147/EC of the European Parliament and of the Council⁵. As an amendment of Directive 2009/147/EC is not foreseen and is not possible within the time limit of three months after the adoption of the decision of the Standing Committee, laid down in the Convention, the Union for the time being needs to apply stricter conservation measures, as provided for in Article 12 of the Convention.

⁴ OJ L 38, 10.2.1982, p. 1.

⁵ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p.7)

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the thirty-ninth meeting of the Standing Committee of the Convention on the conservation European wildlife and natural habitats, shall be to support the proposal to move *Branta leucopsis* from Appendix II to Appendix III thereto and to indicate to the Contracting Parties to the Convention that, for the time being, the Union intends to apply stricter conservation measures for this species, as provided for in Article 12 of the Convention.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President