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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the fourth meeting of the Conference of the Parties to the Minamata Convention on Mercury as regards the adoption of decisions amending Annexes A and B to that Convention on mercury-added products and manufacturing processes in which mercury or mercury compounds are used, in accordance with Article 4, paragraph 8 and Article 5, paragraph 10 of 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, at the fourth meeting of the Conference of the Parties to the Minamata Convention on Mercury ('the Agreement') regarding the envisaged adoption of Decisions amending Annexes A and B to that Convention. These annexes establish lists of mercury-added products and of manufacturing processes using mercury or mercury compounds ('mercury processes'), subject either to phase-out dates or to provisions regulating mercury use¹.

2. CONTEXT OF THE PROPOSAL

2.1. The Minamata Convention on Mercury ('the Agreement')

The Agreement is the main international legal framework aimed at protecting human health and the environment from anthropogenic emissions and releases of mercury and mercury compounds to air, water and land. It addresses the whole life-cycle of mercury, from primary mercury mining to mercury waste disposal.

It entered into force on 16 August 2017.

The European Union ('the Union') is a party to the Agreement², as well as most Member States³.

Pursuant to Article 4, paragraph 1 of the Agreement, the mercury-added products listed in Part I to Annex A (e.g. certain compact fluorescent lamps) can no longer be manufactured, imported and exported after the phase-out dates specified therein.

In accordance with Article 4, paragraph 3, Parties shall take measures to regulate mercury use in respect of the mercury-added products listed in Part II to Annex A.

In accordance with Article 5, paragraph, 2, the mercury processes listed in Part I of Annex B (e.g. chlor-alkali production) must cease using mercury or mercury compounds by the phase-out dates set therein.

By virtue of Article 5, paragraph, 3, Parties shall take measures to regulate mercury use in the mercury processes listed in Part II of Annex B, including in terms of conversion to mercury-free processes, when economically and technically feasible.

Pursuant to Articles 4, paragraphs 4, 7, 8, and 5, paragraphs 5, 9, 10, Annexes A and B shall be reviewed by 16 August 2022, taking into account the Parties' amendment proposals⁴ and information transmitted on mercury-added products and available technical and economic mercury-free alternatives, while considering the environmental and human health risks and benefits.

¹ For the purpose of this document, the expression 'regulating mercury use' covers generically requirements such as those established in Parts II of Annexes A and B to the Minamata Convention on Mercury.

² Council Decision (EU) 2017/939 of 11 May 2017 on the conclusion on behalf of the European Union of the Minamata Convention on Mercury (OJ L 142, 2.6.2017, p. 4).

³ On 16 November 2020, twenty-four Member States had ratified the Minamata Convention on Mercury, i.e. Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia and Sweden.

⁴ For the purpose of this document, 'Parties' means Parties to the Convention on Mercury.

Articles 26 and 27 set the basic rules regarding i.a. the submission by the Parties of proposals for amending the Annexes to the Agreement, as well as for the adoption and entry into force of the amended Annexes. Proposals for amending the Annexes must be communicated to all Parties by the Secretariat of the Agreement at least six months before the Conference of the Parties to the Agreement ('COP') at which it is proposed for adoption, i.e. in this case at the latest on 1 May 2021. Proposed amended Annexes are adopted in accordance with the voting rules set in Article 26, paragraph 3, and in Decision MC-1/1 on Rules of Procedures adopted by the COP at its first meeting (24-29 September 2017)⁵.

The amendment to an Annex enters into force for all Parties one year after the Depository of the Agreement communicates its adoption, except for those Parties having made a relevant declaration in accordance with Article 30, paragraph 5. Since the Union has not made such a declaration, the general rule on the entry into force of amended or new Annexes applies to it.

2.2. The Conference of the Parties ('COP')

The COP performs the functions assigned to it by the Agreement. To that end, it shall consider and undertake *inter alia* any action that may be required for achieving the objectives of the Agreement, including the adoption of relevant guidelines.

According to Article 28 of the Agreement and the above-mentioned Decision MC-1/1, each Party has one vote. However, the Union, as a regional economic integration organisation, exercises its right to vote, on matters within its competence, with a number of votes equal to the number of its Member States that are parties to the Agreement. The Union shall not exercise its right to vote if any of its Member States exercises its right to vote, and vice versa.

2.3. The envisaged acts of the Conference of the Parties

The COP, during its third meeting (25-29 November 2019), adopted Decision MC-3/1⁶ establishing an ad hoc group of technical experts to proceed with discussions on mercury-added products and mercury processes during the intersessional period leading to its fourth meeting ('COP4'). The mandate of this group called in particular for improving and organising the information submitted by the Parties in accordance with Article 4, paragraphs 4 and 7, and Article 5, paragraphs 4 and 9, of the Agreement, on the availability, technical and economic feasibility, environmental and health risks and benefits of mercury-free alternatives to such products and processes.

In light of the outcome of the expert work, COP4 is expected to adopt one or more decisions on this matter (the envisaged acts).

The envisaged acts will amend Annex A to the Agreement by complementing it with additional mercury-added products for which economically and technically feasible mercury-free alternatives benefitting human health and the environment are available and which will be subject to a manufacturing, import and export prohibition at specified phase-out dates or to measures regulating mercury use.

⁵ Decision MC-1/1 *Rules of procedure*, UNEP/MC/COP1/Dec. 1, available at: <http://www.mercuryconvention.org/Meetings/COP1/Decisions/tabid/8648/language/en-US/Default.aspx>

⁶ Decision MC-3/1 *Review of annexes A and B*, UNEP/MC/COP3/Dec. 1, available at: <http://www.mercuryconvention.org/Meetings/COP3/Decisions/tabid/8654/language/en-US/Default.aspx>

The envisaged acts will also amend Annex B to the Agreement by complementing its Part I with mercury processes for which economically and technically feasible mercury-free alternatives benefitting human health and the environment are available and which will therefore cease to use mercury by a specified phase-out date.

The envisaged acts will amend Part II of Annex B to the Agreement by strengthening its provisions regulating mercury use for vinyl chloride monomer (VCM), sodium and potassium methylate or ethylate (alcoholates) and polyurethane production and/or by adding other mercury processes with associated mercury use requirements.

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

The objective of the Union is to phase-out mercury use at Union and global level, as rapidly and as completely as possible, where viable alternatives exist.⁷ The achievement of this objective requires notably the phasing-out of mercury-added products and the conversion of mercury processes to non-mercury processes, when viable, technically feasible and beneficial to human health and the environment.

Progress at global level towards this objective would contribute to the Zero Pollution ambition for a toxic-free environment set-out in the European Green Deal⁸. It would also contribute to implementing the 2020 EU Chemical Strategy for Sustainability⁹ in which the European Commission has committed to maintain a leading role at international level concerning the sound management of chemicals, including by promoting EU standards globally.

Review of Annex A to the Agreement setting the list of mercury-added products subject to a manufacturing, import and export ban or to requirements on mercury use.

The position to be taken on the Union's behalf is based upon the following elements:

Annex II to Regulation (EU) 2017/852 on Mercury ('Mercury Regulation')¹⁰, which has transposed Annex A (Part I) to the Agreement, has a broader scope of application than the Agreement, as it covers more mercury-added products (e.g. button cell batteries).

The Union submission (March 2020), transmitted in accordance with Decision MC-3/1¹¹, identifies a number of other mercury-added products for which feasible and beneficial mercury-free alternatives are available, including products which are already prohibited from being placed on the internal market and imported^{12/13}, e.g. in accordance with Directive

⁷ See [Council Conclusions 'Review of the Community Strategy concerning Mercury', 14 March 2011](#)

⁸ Communication from the Commission of 11.12.2019, *The European Green Deal*, COM(2019) 640 final.

⁹ Communication of the Commission 'Chemicals Strategy for Sustainability Towards a Toxic-Free Environment' (COM(2020) 667 final, of 14.10.2020).

¹⁰ Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on Mercury and repealing Regulation (EC) No 1102/2008 (OJ L 137, 24.05.2017, p. 1).

¹¹ *Submission from the EU on mercury-added products and manufacturing processes using mercury or mercury compounds* (March 2020), available at: http://www.mercuryconvention.org/Portals/11/documents/meetings/COP4/submissions/EU_AnnexAB.pdf

¹² The notion of 'placing on the internal market' includes 'import' under EU legislation regulating the placing on the market of mercury-added products.

2011/65/EU ('RoHS')¹⁴ and Regulation (EC) No 1907/2006 ('REACH')¹⁵, but which are not yet subject to a manufacturing and export prohibition.

Accordingly, the review at global level of Annex A provides several opportunities to enhance the level playing field worldwide and to reduce further mercury use and associated pollution:

- (1) To narrow the gap between the existing, more advanced Union law and the Agreement by adding, to Part I of its Annex A, products already listed in Annex II to the Union Mercury Regulation.
- (2) To add in Part I of Annex A to the Agreement products that are not yet subject to a ban on manufacturing and export under the Union Mercury Regulation but are nonetheless either no longer allowed to be placed on the Union market or subject to on-going legislative developments aimed at setting a similar ban at Union level. Should Parties choose to add one or more products in Part II of Annex A to the Agreement, i.e. with no specified dates for their phase-out, the Union would still see such policy option as an opportunity to narrow the gap between the Agreement and Union law, provided that clear mercury-regulating measures are set for such products.

Should such additions be agreed upon by Parties at COP4 and supported by the Union, the Commission would, in line with Article 20 of the Mercury Regulation, adopt a Delegated Act aimed to align Annex II to the Regulation with the amended Annex A to the Agreement.

Hence, the position to be taken on the Union's behalf at COP4 shall consist in supporting the adoption of acts aimed to extend the scope of application of Annex A to the Agreement to mercury-added products that are already prohibited from being manufactured and traded in accordance with Annex II to the Union Mercury Regulation, or are already banned from being placed on the Union market, or are subject to on-going legislative developments aimed at setting a similar ban at Union level, and that can be replaced with mercury-free alternatives proven to be economically and technically feasible as well as beneficial from an environmental and human health perspective.

Review of Annex B to the Agreement setting the list of mercury processes subject to a 'phase-out' date or to requirements on mercury use.

The position to be taken on the Union's behalf is based upon the following elements:

¹³ The full list of relevant EU law is available in the Commission Staff Working Document Impact Assessment '*Ratification and Implementation by the EU of the Minamata Convention on Mercury Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on mercury, and repealing Regulation (EC) No 1102/2008*' (SWD/2016/017 final, of 2.2.2016).

¹⁴ Directive 2011/65/EU of the European Parliament and of the Council of 8 June 2011 on the restriction of the use of certain hazardous substances in electrical and electronic equipment (OJ L 174, 01.07.2011, p. 88).

¹⁵ Regulation No 1907/2006 of the European Parliament and of the Council of 18 December 2006 on the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC (OJ L 396 of 30.12.2006, p. 1).

Union law, in particular Article 7, paragraphs 1 and 3, and Annex III to the Mercury Regulation has transposed Article 5, paragraphs 2 and 3, and Annex B, to the Agreement, in a stricter manner.

Firstly, whilst Annex B to the Agreement covers five specific mercury processes (production of chlor-alkali, acetaldehyde, VCM, alcoholates and polyurethane), Annex III to the Mercury Regulation contains a catch-all provision prohibiting, at specified phase-out dates, the use of mercury or mercury compounds in all manufacturing processes in the Union, i.e. when used as a catalyst (1 January 2018) or as an electrode (1 January 2022). The scope of application of this prohibition is thus open-ended under Union law.

Secondly, although Annex III to the Mercury Regulation sets several derogating phase-out dates for VCM, alcoholates and polyurethane production, those provisions are stricter in comparison with Annex B to the Agreement: indeed, the Mercury Regulation prohibits mercury use as *electrode for chlor-alkali production* since 11 December 2017, whereas the Agreement sets 2025 as a phase-out date. Furthermore, whereas the Mercury Regulation prohibits mercury use as *catalyst for polyurethane production* since 1 Janvier 2018, for *VCM production* as from 1 January 2022 and as *electrode for alcoholate production* as from 1 January 2028, the Agreement sets only a restriction on mercury use and specifies that the Parties either ‘aim at’ phasing-out this use by 16 August 2027 (polyurethane) or phase-out such use five years after the COP has determined that mercury-free alternatives have become technically and economically feasible (VCM and alcoholates). The Mercury Regulation specifies that existing production capacities of alcoholates with mercury used as electrodes must not increase before the phase-out date (1 January 2028), whilst the Agreement foresees neither such a stand-still obligation for any of the three mercury processes (VCM, polyurethane and alcoholates) nor a binding phase-out date.

Alike the review of Annex A to the Agreement, the review of Annex B provides several opportunities to enhance the level playing field world-wide and reduce the industrial use of mercury:

- (1) To narrow the gap between existing, more advanced Union law and the Agreement by adding, to Annex B to the Agreement, phase-out dates for VCM, alcoholates and polyurethane production using mercury, in consistency with the Union *acquis* and considering existing available technically and economically feasible mercury-free alternatives processes, as reported in the March 2020 Union submission under Decision MC-3/1.
- (2) To introduce, in Annex B to the Agreement, a catch-all provision covering all existing mercury processes together with phase-out dates.
- (3) To introduce, in Annex B to the Agreement, a provision prohibiting any increase in production capacities of mercury processes by the phase-out dates to be set by the Parties.

Hence, the position to be taken on the Union’s behalf at COP4 shall consist in supporting the adoption of acts aimed to introduce a phase-out date for all mercury processes and to strengthen provisions regulating mercury use by adding, in particular, the duty not to increase production capacities by the relevant phase-out date.

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) regulates 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’*¹⁶.

4.1.2. Application to the present case

The COP is a body set up by an agreement, namely the Minamata Convention on Mercury.

The acts which the COP is called upon to adopt constitute act having legal effects, because the Parties to the Agreement would have to take measures to ensure that they are implemented and complied with.

The envisaged acts do 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 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 acts relate to the protection of the environment and human health.

Thus, 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.

¹⁶ 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.

Proposal for a

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on the position to be taken on behalf of the European Union at the fourth meeting of the Conference of the Parties to the Minamata Convention on Mercury as regards the adoption of decisions amending Annexes A and B to that Convention on mercury-added products and manufacturing processes in which mercury or mercury compounds are used, in accordance with Article 4, paragraph 8 and Article 5, paragraph 10 of that Convention

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 Minamata Convention on Mercury¹⁷ ('the Agreement') was concluded by the Union by Council Decision (EU) 2017/939¹⁸ and entered into force on 16 August 2017.
- (2) Pursuant to Decision MC-1/1 on Rules of Procedures, adopted by the Conference of the Parties to the Agreement at its first meeting, the Parties shall make every effort to reach agreement on all matters of substance by consensus.
- (3) The Conference of the Parties to the Agreement, during its fourth meeting on 1-5 November 2021, is expected to adopt one or more decisions ('the proposed Decisions') amending Annex A to the Agreement containing the list of mercury-added products that are subject either to a manufacturing, import and export prohibition at a specified date or to mercury-regulating measures, and/or Annex B to the Agreement containing a list of manufacturing processes using mercury or mercury compounds ('mercury processes') subject to an obligation to cease mercury use at a specific date or to mercury-regulating requirements.
- (4) The proposed Decisions would extend the scope of application of Annex A to the Agreement to further mercury-added products with associated phase-out dates or mercury-regulating measures.
- (5) Annex II to Regulation (EU) 2017/852¹⁹ transposing Annex A to the Agreement into Union law already covers more mercury-added products and other mercury-added

¹⁷ Certified copy of the Minamata Convention on Mercury available at: <https://treaties.un.org/doc/Treaties/2013/10/20131010%2011-16%20AM/CTC-XXVII-17.pdf>

¹⁸ Council Decision (EU) 2017/939 of 11 May 2017 on the conclusion on behalf of the European Union of the Minamata Convention on Mercury (OJ L 142, 2.6.2017, p. 4).

¹⁹ Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on Mercury and repealing Regulation (EC) No 1102/2008 (OJ L 137, 24.05.2017, p. 1).

products are subject either to a prohibition on the placing on the internal market under Union legislation or to on-going legislative developments at Union level aiming at such a prohibition.

- (6) The proposed Decisions would broaden the scope of application of Annex B to the Agreement by introducing phase-out dates for the mercury processes it covers, and/or by adding further mercury processes combined with phase-out dates and/or by strengthening its mercury-regulating requirements for the concerned processes.
- (7) Annex III to Regulation (EU) 2017/852 transposing Annex B to the Agreement into Union law covers more mercury processes and sets phase-out dates for all the concerned processes.
- (8) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties to the Agreement, as the proposed Decisions, if approved, will have legal effects since the Parties to the Agreement will have to take measures to implement them at national and/or regional levels.
- (9) The Union contributed significantly to develop provisions of the Agreement on mercury-added products and mercury processes and to the intersessional expert work launched by Decision MC-3/1²⁰ adopted by the Conference of the Parties to the Agreement at its third meeting and that has led to the proposed Decisions;
- (10) The Union should support the adoption of Decisions by the Conference of the Parties to the Agreement that allow narrowing the gap between Union law and the Agreement and are aimed to extend the scope of application of the Agreement to mercury-added products that are already prohibited from being placed the Union market, or are subject to on-going legislative developments aimed at setting a similar ban at Union level, in consistency with the Union objective to phase-out the use of mercury and mercury compounds whenever feasible;
- (11) The Union should also support the adoption of Decisions by the Conference of the Parties to the Agreement that allow narrowing the gap between Union law and the Agreement by ensuring that mercury processes already addressed under Regulation (EU) 2017/852 are made subject to phase-out by specified dates or to stricter requirements regulating mercury use.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the fourth meeting of the Conference of the Parties to the Agreement shall be to support (i) the adoption of Decisions amending Annexes A and B to the Agreement that would narrow the gap between Union law and the Agreement and (ii) the adoption of Decisions amending Annex A applying a global manufacture and trade prohibition on mercury-added products that are already or shall soon be prohibited from being placed on the Union market and by setting phase-out dates or stricter requirements for mercury processes.

²⁰ Decision MC-3/1 *Review of annexes A and B*, UNEP/MC/COP3/Dec. 1, available at: <http://www.mercuryconvention.org/Meetings/COP3/Decisions/tabid/8654/language/en-US/Default.aspx>

Article 2

Refinement of the position referred to in Article 1 may be agreed to, in the light of developments at the fourth meeting of the Conference of the Parties to the Agreement, by the representatives of the Union, in consultation with Member States during on-the-spot coordination meetings, without a further decision of the Council.

Article 3

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President