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PROPOSAL

From:	Ms Ilze JUHANSONE, Secretary-General of the European Commission
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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 proposals to amend Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with a view to the 15th meeting of the Conference of the Parties, and on the position of the European Union on proposals by other Parties to amend Annex IV and other annexes

Delegations will find attached document COM(2020) 362 final.

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2020/0167 (NLE)

Proposal for a

COUNCIL DECISION

on the submission, on behalf of the European Union, of proposals to amend Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with a view to the 15th meeting of the Conference of the Parties, and on the position of the European Union on proposals by other Parties to amend Annex IV and other annexes

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a Council decision on the submission, on behalf of the European Union, of proposals to amend Annex IV to the Basel Convention, with a view to the 15th meeting of the Conference of the Parties to the Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (CoP-15). The Conference of the Parties is scheduled to take place on 19-30 July 2021. This proposal also covers the negotiating position of the Union on possible amendments of the relevant annexes proposed by other Parties.

2. CONTEXT OF THE PROPOSAL

2.1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') was adopted on 22 March 1989 and entered into force in 1992. The European Union as well as its Member States are Parties to the Convention¹. The Convention now binds 187 Parties.

The Convention's requirements apply to hazardous waste defined in Article 1 and listed in Annex VIII to the Convention and other waste listed in Annex II which contains waste collected from households, residues arising from the incineration of household waste and as from 1 January 2021, some types of plastic waste. The Convention also lists waste entries in Annex IX which are not subject to the Convention's requirements unless such waste contains a material belonging to a category in Annex I to an extent causing it to exhibit a hazardous characteristic in Annex III. Electrical and electronic waste which is hazardous is listed in Annex VIII (entry A1180) and if not hazardous in Annex IX (entry B1110). Annex II does not contain any entry for electrical and electronic waste.

Annex IV to the Convention lists and specifies the waste management operations which are considered as 'disposal' according to the definition of this term in Article 2(4) of the Convention. In the Convention, the term 'disposal' covers both final disposal operations such as landfill and incineration (listed in in Annex IVA), and recovery operations such as recycling and other recovery operations (listed in Annex IVB).

The importance of the listing in Annex IV is that only "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of" are considered as 'wastes' as defined in Article 2(1) of the Convention, and 'disposal' means "any operation specified in Annex IV". The Convention's requirements thus only apply to disposal operations listed in Annex IV. This Annex should thus cover all possible waste management operations that occur or might occur in practice, and regardless of whether they are carried out in accordance with national or international law or whether they are considered to be environmentally sound. If this would not be the case, it would create loopholes in relation to the Convention's requirements.

The Convention's main requirements are the following:

¹ Council Decision 93/98/EEC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, OJ L 39, 16.2.1993, p. 1.

- An export ban from OECD countries to non-OECD countries² of waste listed as hazardous in Annex VIII, and
- A control system (the ‘PIC procedure’) for export, import and transit of waste listed as requiring special consideration in Annex II or hazardous in Annex VIII but not subject to the above export ban. The PIC procedure means that exports shall be notified in advance to the competent authorities of the States of import and transit. The notification shall be made by the exporting State which can also require generators or exporters to make such notifications through the channel of its competent authority. The notifications shall be made in writing containing the declarations and information specified in Annex V A to the Convention. A waste export may only proceed if and when all States concerned have given their written consent. (Article 6 of the Convention).

2.2. The Conference of the Parties

The Conference of the Parties to the Basel Convention is the principal decision-making body of the Convention. It has powers to amend the Annexes to the Convention and it meets every two years.

The review of Annexes I, III, IV and related aspects of Annex IX to the Convention was initiated by the 12th meeting of the Conference of the Parties (CoP-12) by its decision BC-12/1.³

The 13th meeting of the Conference of the Parties (CoP-13) decided to establish an expert working group (EWG) for the review of the above annexes, consisting of 50 members nominated from Parties on the basis of equitable geographical representation of the five regional groups of the United Nations. Participants from the EU and its Member States in the EWG are the Commission, Estonia, Germany, the Netherlands and Poland. Written submissions and oral contributions have been coordinated in the Council Working Party on International Environment Issues (WPIEI). CoP-13 agreed that the EWG should give higher priority to work on Annex IV and related aspects of Annex IX. During 2017-2019, the EU and its Member States submitted preliminary proposals for amendments of Annex IV to the Secretariat of the Convention and the EWG.

During the 14th meeting of the Conference of the Parties (CoP-14) by its decision BC-14/16, the mandate of the EWG was extended to also review the two existing entries for electrical and electronic waste, i.e. entry B1110 in Annex IX and the mirror entry A1180 in Annex VIII as well as the consequential implications of the review of Annexes I, III and IV for other annexes of the Convention and for relevant decisions of the Conference of the Parties. By its decision BC-14/16, CoP-14 requested the EWG to continue its work as follows: amendment proposals are negotiated and possibly adopted at the 15th meeting of the Conference of the Parties (CoP-15) with regard to Annexes IV, VIII (A1180) and IX (B1110).

The EWG has issued a number of recommendations and options for Parties to consider if they wish to submit proposals for CoP-15. The deadline set by the Secretariat of the Basel Convention to submit proposals to amend the annexes to the Convention expires on 4

² Article 4A to the Convention which entered into force in December 2019 prohibits all transboundary movements from each Party included in Annex VII (Parties and other States which are members of the OECD, EU, Liechtenstein) to States not included in Annex VII of hazardous wastes covered by the Convention.

³ More information is available on the website of the Basel Convention, see <http://www.basel.int/Implementation/LegalMatters/LegalClarity/ReviewofAnnexes/AnnexesI,III,IVandrelatedaspectsofAnnexes/tabid/6269/Default.aspx>

December 2020 taking into account the postponement of the Conference of the Parties from May to July 2021.

The aim of the proposals is to amend and clarify the descriptions of disposal operations listed in Annex IV to the Convention. The proposals will if adopted result in improved legal clarity and therefore facilitate controls of shipments of waste and the prevention of illegal shipments. They will also support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.

The EU and its Member States have put forward preliminary proposals concerning the list of disposal operations in Annex IV to the Secretariat of the Convention and the EWG during 2017-2019. These proposals were discussed with other Parties participating in the EWG. Also recommendations concerning the classifications of electrical and electronic waste in Annexes VIII and IX were discussed in the EWG.

If amendments are agreed at CoP-15 they will have to be implemented in the EU waste framework directive 2008/98/EC⁴ (the list of waste management operations corresponding to Annex IV to the Convention) and the EU waste shipment regulation 1013/2006⁵ (the specific entries for electrical and electronic waste corresponding to Annexes VIII and IX to the Convention).

2.3. The envisaged act

The proposal for a Council Decision proposes the following:

To amend Annex IV to the Convention as regard its general introduction, captions and introductory text to distinguish and explain the terms final disposal and recovery and clarify that all waste management operations are covered.

To update and clarify the descriptions of waste management operations in Annex IV and ensure that all operations, including the interim operations, are covered by the Convention's requirements.

This proposal for a Council decision also covers, in principle, subject to coordination on-spot, the negotiating position of the Union if additional amendments of the relevant annexes are proposed by other Parties. Such proposals may concern the list of waste management operations in Annex IV and the entries for electrical and electronic waste which are currently in Annex VIII and IX and could also be included in Annex II to the Convention.

The modifications of the annexes to the Convention will have to be implemented through amendments of Directive 2008/98/EC and Regulation (EU) No 1013/2006. Directive 2008/98/EC contains the list of waste management operations corresponding to Annex IV to the Convention and Regulation 1013/2006 includes the specific entries for electrical and electronic waste corresponding to Annexes VIII and IX to the Convention.

The changes for operators and authorities as regards exports from the EU will depend on the types of changes that might be agreed (notably which Annexes would ultimately be amended), the type of waste and the countries of destination.

Amendments of Annex IV to the Convention will not have any direct consequences for exports or other shipments of waste but will clarify the description of waste management operations to be carried out after waste has been shipped. This will facilitate for authorities

⁴ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, as amended, OJ L 312, 22.11.2008, p. 3.

⁵ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, as amended, OJ L 190, 12.7.2006, p. 1.

when they perform controls on waste shipments and help them apply the Convention's requirements with a view to prevent illegal shipments. It will also support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.

To the extent additional categories of electrical and electronic wastes are included in Annex II or VIII to the Convention, and Annex V to Regulation (EC) No. 1013/2006 were to be amended accordingly, the exports of such wastes from the EU to non-OECD countries would be prohibited under Article 36 of Regulation (EU) No 1013/2006. Exports within the OECD of such waste would in principle have to follow the PIC procedure. An implementation of these amendments to the Convention into Regulation (EC) No 1013/2006 would also result in subjecting intra-EU shipments of wastes newly included in Annexes II or VIII of the Basel Convention to the notification procedure, in accordance with Article 3(1)(b)(i) of Regulation 1013/2006.

The procedure for amending annexes of the Convention is governed by Articles 17 and 18 of the Convention. More particularly, any proposed amendment must be made by a Party and communicated by the Secretariat to all Parties at least six months before the meeting of Conference of the Parties. In addition, any such amendment must be adopted at a meeting of the Conference of the Parties. The envisaged act will become binding on the Parties in accordance with Article 18(2)(c) of the Convention, which provides: "On the expiry of six months from the date of the circulation of the communication by the Depositary, the annex shall become effective for all Parties to this Convention or to any protocol concerned, which have not submitted a notification in accordance with the provision of subparagraph (b) above".

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

The Union should submit proposals with regard to Annex IV to the Convention to:

- Amend Annex IV to include a general introduction clearly distinguishing the terms final disposal and recovery, clarify that all waste management operations that occur or might occur in practice are covered regardless of their legal status and whether they are considered to be environmentally sound, and that also operations occurring prior to submission to other operations ("interim operations") are covered.
- Amend Annex IV to include captions and introductory texts explaining what is meant by non-recovery operations (Annex IVA) and recovery operations (Annex IVB), and
- Amend Annex IV concerning existing operations and the introduction of new operations in Annex IV, which would aim, *inter alia*, to update and clarify the descriptions of operations in line with scientific, technical and other developments since the Convention was adopted in 1989, and ensure by the introduction of catch-all provisions that all operations not specifically mentioned are covered by the Convention's requirements.

The above proposals have the objectives to:

- Ensure that the appropriate control mechanisms of the Convention are fully applicable and would therefore if adopted improve controls of shipments of waste and facilitate the prevention of illegal shipments,
- Improve legal clarity and a common understanding and interpretation of the waste management operations by Parties, and

- Support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.

If amendments of the relevant annexes are proposed by other Parties, which could achieve the same objectives as those behind the Union's proposal, such proposals could in principle be supported by the Union. This may concern the list of operations in Annex IV and the entries for electrical and electronic waste which are currently in Annex VIII (A1180) and IX (B1110) and could also concern new proposed entries for electrical and electronic waste waste in Annex II (categories of wastes requiring special consideration). Proposals regarding the classification of electrical and electronic waste in Annex II and VIII could ensure the achievement of the above objectives in relation to one of the waste streams of most serious concern for the environment and health, and which has also one of the highest potentials for contributing to the circular economy.

The provisions of the Convention are implemented in the Union through Directive 2008/98/EC on waste, which contains in its Annexes I-II the lists of waste management operations corresponding to Annex IV to the Basel Convention, and Regulation (EC) No 1013/2006, which governs exports from and imports to the Union as well as shipments between Member States (Article 1). The directive and regulation also apply within the European Economic Area (the 'EEA').

When amendments of Annexes II and VIII to the Convention have been adopted they would need to be implemented into Union law and more specifically in Directive 2008/98/EC and Regulation (EC) No 1013/2006. The modifications in Regulation (EC) No 1013/2006 could mean subjecting shipments within the EU and the EEA of new categories of waste in Annex II to new control measures and a ban on export to non-OECD countries for these wastes. While this situation would be desirable for the above reasons as regards exports from the EU, this could have undesired and problematic effects on intra-EU and intra-EEA shipments of waste destined for recycling, as it would subject them to new notification procedures. These shipments are already subject to environmental protection requirements in Union legislation on waste and the introduction of new administrative procedures could make recycling in the EU more complicated and costly while bringing only limited benefits from an environmental perspective.

In order to maintain the current situation within the Union and the EEA, i.e. without the control system of the Convention, it would be necessary to notify the provisions concerned to the Secretariat of the Convention under Article 11 of the Convention and take necessary steps under the OECD Decision. Article 11 of the Convention allows Parties to enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary waste movements provided that the agreements or arrangements are compatible with the environmentally sound management of waste as required by the Convention. The agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by the Convention in particular taking into account the interests of developing countries. Notifications under Article 11 have been made for example concerning the OECD Decision.

Consequently, this proposal for a Council decision envisages that the Union will, in accordance with Article 11 of the Convention, notify the provisions applied to shipments of the new categories waste within the Union and the EEA, in so far as these provisions differ from the envisaged act, and specifying that our provisions are based on a system of environmentally sound management compatible with the Convention. Steps will also need to be taken to inform the OECD secretariat of the above situation because of links between amendments of the annexes to the Convention and the above OECD decision.

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.’*

4.1.2. Application to the present case

The Conference of the Parties to the Basel Convention is a body set up by the Convention.

The act which the Conference of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 18 of the Convention. It will affect the scope and the content of EU legislation, namely Directive 2008/98/EC and Regulation (EC) No 1013/2006. The Directive and the Regulation implement the Convention by, *inter alia*, laying down the list of waste management operations and the procedures for exports from and imports to the Union as well as shipments between Member States. The Directive and the Regulation also apply within the EEA. When the Annexes to the Convention have been amended, these amendments would need to be implemented in the above Directive and Regulation, with the exception of provisions on intra-EU shipments of waste.

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 the protection of the 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.

Proposal for a

COUNCIL DECISION

on the submission, on behalf of the European Union, of proposals to amend Annex IV to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with a view to the 15th meeting of the Conference of the Parties, and on the position of the European Union on proposals by other Parties to amend Annex IV and other annexes

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 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') entered into force in 1992 and was concluded by the Union by means of Council Decision 93/98/EEC⁶.
- (2) Regulation (EC) No 1013/2006 of the European Parliament and of the Council⁷ implements the Convention within the Union. Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste⁸ contains the list of waste management operations contained in Annex IV to the Convention.
- (3) Pursuant to Article 15(5)(b) of the Convention, the Conference of the Parties shall consider and adopt, as required, amendments to the Convention and its Annexes. Amendments to the Convention are to be adopted at a meeting of the Conference of the Parties.
- (4) Based on a proposal pursuant to Articles 17-18 of the Convention submitted by the Union or any other Party to the Convention, the Conference of the Parties may during its 15th meeting in July 2021 consider amendments of Annexes II, IV, VIII and IX to the Convention.
- (5) The Union should submit proposals to amend Annex IV to the Convention in order to include a general introduction clearly distinguishing the terms final disposal and recovery, clarify that all waste management operations that occur or might occur in practice are covered regardless of their legal status and whether they are considered to be environmentally sound, and that also operations occurring prior to submission to

⁶ Council Decision 93/98/EEC of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the control of transboundary movements of hazardous wastes and their disposal (Basel Convention) (OJ L 39, 16.2.1993, p. 1).

⁷ Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste, as amended, OJ L 190, 12.7.2006, p. 1.

⁸ Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste, as amended, OJ L 312, 22.11.2008, p. 3.

other operations (“interim operations”) are covered; include captions and introductory texts explaining what is meant by final disposal operations (Annex IVA) and recovery operations (Annex IVB); and to update and clarify the descriptions of operations in line with scientific, technical and other developments which have occurred since the Convention was adopted in 1989, and ensure by the introduction of catch-all provisions that all operations not specifically mentioned are covered by the Convention’s requirements.

- (6) The descriptions of waste management operations contained in Annex IV are general and could benefit from further clarification. The Union should therefore be supportive of the development of explanatory notices or guidance by the Conference of the Parties to further clarify the content of these operations. These notices or guidance should provide explanations and examples of the operations covered, and should not be included in the text of the Convention.
- (7) The above proposals have the objectives to ensure that the appropriate control mechanisms of the Convention are fully applicable and would therefore if adopted improve controls of shipments of waste; facilitate the prevention of illegal shipments; improve legal clarity and establish a common understanding and interpretation of the waste management operations by Parties; and support the environmentally sound management of waste at global level and contribute to the transition towards a global circular economy.
- (8) The Union should additionally support in principle amendments subsequently proposed by other Parties to the Convention concerning the list of waste management operations in Annex IV, the entries for electrical and electronic waste which are currently in Annex VIII (A1180) and IX (B1110) and new proposed entries for such waste in Annex II (categories of wastes requiring special consideration), provided they could achieve the same objectives as those behind the Union’s proposal.
- (9) It is appropriate to establish the position to be taken on the Union’s behalf at the Conference of the Parties, as the envisaged act (modification of the Annexes of the Convention) will be binding on the Union and affect the scope and the content of Union law, namely Directive 2008/98/EC and Regulation (EC) No 1013/2006.
- (10) It is appropriate to maintain the current situation for shipments of non-hazardous electrical and electronic waste within the Union and the EEA, and therefore not use the control system stemming from the possible addition of an entry in Annex II to the Convention for such shipments. To that end, the Union should, as far as necessary, use the procedures set out in the OECD Decision⁹ and the procedure for entry into bilateral, multilateral, or regional agreements or arrangements regarding transboundary movement of hazardous wastes or other wastes with Parties or non-parties in accordance with Article 11 of the Convention¹⁰ to ensure that no additional control is imposed on shipments of non-hazardous waste within the Union and the EEA, as a result of the adoption of amendments to Annex II to the Convention.

⁹ Organisation for Economic Cooperation and Development (OECD) Council Decision C(2001)107/FINAL concerning the revision of Decision C(92)39/FINAL on the control of transboundary movements of wastes destined for recovery operations (the ‘OECD Decision’)

¹⁰ Please note that the Union is at an advanced stage with the use of the procedure under Article 11 of the Basel Convention, so that it might not be necessary to mention it in this Council Decision.

HAS ADOPTED THIS DECISION:

Article 1

1. At the 15th meeting of the Conference of the Parties to the Basel Convention, the Union shall pursue the following objectives:
 - (a) To ensure that the appropriate control mechanisms of the Convention are fully applicable, to improve controls of shipments of waste and facilitate the prevention of illegal shipments of waste;
 - (b) To improve legal clarity and a common understanding and interpretation by the Parties of the “disposal operations” covered by Annex IV;
 - (c) To support the environmentally sound management of waste at the global level and to contribute to the transition towards a global circular economy.
2. With a view to the 15th meeting of the Conference of the Parties to the Basel Convention, and in order to achieve the objectives listed in paragraph 1, the Union shall submit the following proposals:
 - (a) Amend Annex IV to include a general introduction clearly distinguishing the terms final disposal and recovery, clarify that all waste management operations that occur or might occur in practice are covered regardless of their legal status and whether they are considered to be environmentally sound, and that also operations occurring prior to submission to other operations (“interim operations”) are covered.
 - (b) Amend Annex IV to include captions and introductory texts explaining what is meant by final disposal operations (Annex IVA) and recovery operations (Annex IVB), and
 - (c) Update and clarify the descriptions of operations in Annex IV in line with scientific, technical and other developments which have occurred since the Convention was adopted in 1989, and ensure, by the introduction of catch-all provisions in Annex IV, that all operations not specifically mentioned are covered by the Convention’s requirements.
3. A detailed proposal according to paragraphs a)-c) above is annexed to this Decision. The Commission, on behalf of the Union, shall communicate this proposal to the Secretariat to the Convention.
4. The Union shall be supportive of the idea that explanatory notes or guidance are developed by the Conference of the Parties to the Convention to further clarify the content of the disposal operations in Annex IV. These explanatory notes or guidance should not be included in the Convention itself.

Article 2

The Union may support amendments proposed by other Parties to the Convention concerning:

1. the list of waste management operations in Annex IV;
2. the entries for electrical and electronic waste which are currently in Annex VIII (A1180) and IX (B1110); and
3. new proposed entries for electrical and electronic waste in Annex II (categories of wastes requiring special consideration),

provided they contribute to achieving the Union's objectives as listed in Article 1(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 15th meeting of the Conference of the Parties, by representatives of the Union, in consultation with the Member States, during on-the-spot coordination meetings, without a further decision of the Council.

Article 4

In case the relevant annexes to the Convention are amended at the 15th meeting of the Conference of the Parties to the Basel Convention, the Union shall, as far as necessary, take the steps required under the OECD Decision and Article 11 to the Convention¹¹ to ensure that the current controls on shipments of non-hazardous waste within the Union and the EEA remain unaffected.

Article 5

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President

¹¹ See footnote 10