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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	19 November 2018
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 position to be taken on behalf of the European Union at the Conference of the Parties to the Rotterdam Convention regarding compliance procedures

Delegations will find attached document COM(2018) 753 final.

Encl.: COM(2018) 753 final



Brussels, 19.11.2018
COM(2018) 753 final

2018/0391 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the Conference of the Parties to the Rotterdam Convention regarding compliance procedures

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 Conference of the Parties (CoP) to the Rotterdam Convention in connection with the envisaged proposal of a procedural annex on procedures and institutional mechanisms for determining non-compliance.

2. CONTEXT OF THE PROPOSAL

2.1. The Rotterdam Convention

The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ('the Convention') aims to promote shared responsibility and cooperative efforts among Parties in the international trade of hazardous chemicals, in order to protect human health and the environment, and contribute to the environmentally sound use of those chemicals. The Convention creates legally binding obligations for the implementation of the Prior Informed Consent (PIC) procedure, and protects countries, particularly developing countries, from unwanted exports of chemicals from producing countries by imposing export obligations on exporting Parties.

The Agreement entered into force on 24 February 2004.

The European Union is a party to the Agreement¹.

2.2. The Conference of the Parties to the Rotterdam Convention

Established pursuant to Article 18 of the Convention, the CoP is the governing body of the Rotterdam Convention. This body normally meets every two years to monitor the implementation of the Convention. It also reviews chemicals brought forward for its consideration by the Chemical Review Committee.

In accordance with Articles 44 and 45 of the Rules of Procedure for the CoP to the Rotterdam Convention, each party has one vote. However, Regional Economic Integration Organisations such as the EU exercise their right to vote with a number of votes equal to the number of their member States that are Parties to the Convention.

2.3. The envisaged act of the Conference of the Parties

At the 9th ordinary meeting the CoP, taking place from 29 April to 10 May 2019, will consider the adoption of an additional annex on procedures and institutional mechanisms for

¹ 2006/730/EC: Council Decision of 25 September 2006 on the conclusion, on behalf of the European Community, of the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade; OJ L 299, 28.10.2006, p. 23–25 (ES, CS, DA, DE, ET, EL, EN, FR, IT, LV, LT, HU, NL, PL, PT, SK, SL, FI, SV); OJ L 335M, 13.12.2008, p. 514–519 (MT)

determining non-compliance ('the envisaged act'). The proposed new annex includes *mutatis mutandis* the same text previously discussed at CoP7 and CoP8 that had the support of an overwhelming majority of Parties.

This annex would fall within the scope of Article 22.2 of the Convention, which provides for a procedure for adopting annexes that concern "*procedural, scientific, technical or administrative matters*". This envisaged act implies the application of an existing agreement, which does not alter the scope or content of the convention.

The purpose of the envisaged act is to render more effective the implementation of the Rotterdam Convention by inserting a non-compliance mechanism as required by Article 17 of the Convention. Article 17 provides that "the Conference of the Parties shall, as soon as practicable, develop and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Convention and for treatment of Parties found to be in non-compliance".

Determining non-compliance is decisive in increasing transparency and the preparedness of the Parties to comply with their international obligations. The annexed proposal provides an alternate means to support Parties wanting to establish compliance procedures, using text already prepared at previous meetings of the CoP. The intent is to begin reaping the benefits of having a facilitative compliance mechanism in place, which will help identify issues and solutions related to compliance and ultimately lead to greater effectiveness of the Convention.

Although the Convention text clearly indicates that procedures and mechanisms to address non-compliance are to be developed and approved "as soon as practicable", 14 years after entry into force of the Convention and negotiations during all of the eight CoPs held since then, Parties have not yet adopted such procedures and mechanisms.

In accordance with Article 22.1 of the Agreement, the proposed additional annex to the Convention would "form an integral part thereof and, unless expressly provided otherwise, a reference to this Convention constitutes at the same time a reference to any annexes thereto". The adoption of the annex does not require ratification by Parties in order to enter into force. Moreover, any Party opposing the proposal would be able to opt out from the application of the new annex, in accordance with Article 22.3(b), which would give a way out to the States voting against it. Thus, the envisaged act will be binding on all Parties that have not opted-out from its application.

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

As a leader in environmental policy-making, it is crucial for the EU to reaffirm its global commitment to promote better implementation of multilateral environmental agreements and standards. Member States' delegations have already explicitly supported the initiative of a proposal to establish the compliance mechanism in an additional annex to the convention on behalf of the EU, at the WPIEI International Chemicals meeting on 7 June 2018.

In addition, this initiative is in line with the Juncker priority to become a stronger global actor, with the sustainable development goals, in particular good health (3) and responsible consumption and production (12), and with the 7th Environment Action Programme.

The Union should therefore support the proposed Annex and co-sponsor it in the run-up to the CoP9.

The position to be taken on the Union's behalf at the CoP needs to be established, since the additional annex will be binding on the Union. This position should be established as early as possible, in order to ensure co-sponsorship of the additional annex.

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 the procedures concerning 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 CoP is a body set up by an agreement, namely the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.

The act, which the CoP is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 22-1 of the Rotterdam Convention.

The envisaged act does not supplement or amend the institutional framework of the Agreement. It will not have a decisive influence on the content of EU legislation, either.

Therefore, the procedural legal basis for the proposed decision is Article 218(9) of the 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.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) of the 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) of the 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’. However, the measures agreed under the Rotterdam Convention, while pursuing an environmental objective, are also largely of a trade-related nature.

4.3. Conclusion

The legal bases of the proposed decision should therefore be the substantive legal bases are Article 207(3) and Article 192(1) of the TFEU, in conjunction with Article 218(9) of the TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the CoP will implement the Rotterdam Convention by a new procedural annex, it is appropriate to publish it in the *Official Journal of the European Union* after its 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 Articles 192(1) and 207(3), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade ('the Convention') was concluded on behalf of by the Union by Council Decision 2006/730/EC³ and entered into force on 24 February 2004.
- (2) Pursuant to Article 22 of the Convention, the Conference of the Parties may adopt additional annexes to the Convention that relate to "procedural, scientific, technical or administrative matters".
- (3) At the 9th ordinary meeting of the Conference of the Parties, taking place from 29 April to 10 May 2019, the Parties will consider the adoption of an additional procedural annex introducing a non-compliance mechanism as required by Article 17 of the Convention.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties, as the additional annex will be binding on the Union.
- (5) The Union reaffirms that it is crucial to promote and to commit globally towards a better implementation of multilateral environmental agreements and standards.

³ OJ L 299, 28.10.2006, p. 23–25.

HAS ADOPTED THIS DECISION

Article 1

The position to be taken on the Union's behalf in the upcoming Conference of the Parties to the Rotterdam Convention shall be to support the draft act (“the envisaged act”) attached to this Decision and/or possible refinements which result in the adoption of procedures and institutional mechanisms for determining non-compliance, as required by Article 17 of the Convention.

Article 2

This Decision is addressed to the Commission.

Article 3

The envisaged act shall be published in the *Official Journal of the European Union* after its adoption by the Conference of the Parties to the Rotterdam Convention.

Done at Brussels,

For the Council
The President