Council of the European Union

Brussels, 27 July 2021
(OR. en)

11087/21

Interinstitutional File: 2021/0243(NLE)

ENV 555

PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	27 July 2021
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2021) 426 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union in the eighth Meeting of the Parties of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds with regard to certain amendments to Annex 3 to the Agreement

Delegations will find attached document COM(2021) 426 final.

Encl.: COM(2021) 426 final

EUROPEAN
COMMISSION

Brussels, 27.7.2021
COM(2021) 426 final

2021/0243 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the eighth Meeting of the Parties of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds with regard to certain amendments to Annex 3 to the Agreement

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 eighth meeting of the Parties of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) in connection with the envisaged adoption of certain amendments to its Annex 3.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on the Conservation of African-Eurasian Migratory Waterbirds

The Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) is dedicated to the conservation of migratory waterbirds and their habitats across Africa, Europe, the Middle East, Central Asia, Greenland and the Canadian Archipelago.

Developed under the framework of the Convention on Migratory Species (CMS) and administered by the United Nations Environment Programme (UNEP), AEWA brings together countries and the wider international conservation community in an effort to establish coordinated conservation and management of migratory waterbirds throughout their entire migratory range.

The Agreement entered into force on 1 November 1999. The European Union is a Contracting Party to this Agreement since 1 October 2005[1]. At present, there are eighty-two Contracting Parties, forty-four from Eurasia (including the EU) and thirty-eight from Africa. Twenty-four EU Member States are parties to the Agreement[2].

Directive 2009/147/EC on the conservation of wild birds (Birds Directive)[3] implements in Union law the commitments set out in the Agreement. The Birds Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection and conservation of these species and lays down rules for their exploitation.

2.2. The Meeting of the Parties

The Meeting of the Parties (MOP) is the principal decision-making body for the Agreement. It has powers to review the Annexes to the Agreement and it meets every three years. Each Party has one vote, but regional economic integration organizations, like the European Union, exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to the Agreement. Any amendment to an Annex shall be adopted by a two-thirds majority of the Parties present at the meeting.

The Eighth Meeting of the Parties of the Agreement will take place on 5-8 October 2021, in Hungary.

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1 Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds. OJ L 345, 8.12.2006, p. 24.

2 Three Member States are not Parties to the Agreement: Austria, Malta, and Poland.

3 OJ L 20 of 26.01.2010. p. 7 - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:020:0007:0025:EN:PDF.

2.3. The envisaged act of the Meeting of the Parties

On 5-8 October 2021, during its eighth meeting, the Meeting of the Parties is to adopt the Resolution 8.xx on the adoption of amendments to the AEWA Annexes in accordance with Article X, paragraph 5, of the Agreement ('the envisaged act').

The purpose of the envisaged act is to amend Annex 3 (Action Plan) to the Agreement. While Annex 2 comprises the list of migratory waterbirds to which the Agreement applies, Annex 3 specifies actions, which the Parties shall undertake in relation to priority species. The priority species are listed in Table 1 of Annex 3 according to certain criteria set out in the same Table.

Article II of the Agreement provides: *'Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status. To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Article III, together with the specific actions determined in the Action Plan provided for in Article IV, of this Agreement'*.

The envisaged act will enter into force for all Parties and become binding on them on the ninetieth day after the date of its adoption by the Meeting of the Parties, except for Parties that have entered a reservation. During the ninety-day period, any Party may, by written notification to the Depositary, enter a reservation with respect to an amendment to an Annex.

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

The proposed position to be taken on the European Union's behalf is to support the envisaged act at the eighth Meeting of the Parties.

The amendments to Table 1 of Annex 3 contained in the envisaged act were proposed by the United Kingdom, based on the recommendations by the AEWA Technical Committee and consist of:

(1) Creating and adding a new (f) category for populations of species listed in category 3 of Column A and category 2 of Column B of Table 1 in Annex 3 to the Agreement, when data for them is deficient, for example when no information is available on trend direction;

(2) Marking categorisations in Table 1 based on statistically uncertain trend and unknown population size with "()" and

(3) Changing the categories of populations following the evidence gathered as part of the 8th edition of the AEWA Conservation Status Report.

The proposed amendments presented in points (1) and (2) above are based on the precautionary principle, as they will ensure the lack of information on the population trend is carefully taken into account in the listing of the populations and therefore in achieving a higher degree of protection, when necessary. These amendments will be approved on behalf of the European Union by the Commission, in line with Article 3(1) and 3(3) of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

With respect of the proposed amendments under point (3) above, these consist of changes in listings for a number of species and their populations. Out of these proposed amendments to

Annex 3 to the Agreement, the change in the listing of five populations of four species does not conform to the relevant EU legislation (Birds Directive). These amendments foresee:

– a change from Column B1 to Column A3 of Table 1 for:

  - two populations (the Iceland/UK & Ireland and the Black Sea & Turkey) of the Greylag Goose (*Anser anser*)
  - the Black Sea & East Mediterranean population of the Red-crested Pochard (*Netta rufina*)
  - the Central and East Siberia/South-west Asia East & Southern Africa population of the Grey Plover (*Pluvialis squatarola squatarola*).

– a change from Criterion 4 in Column A to Criterion (3c) within Column A of Table 1 for the South-east Europe & West Asia/South-west Asia & North-east Africa population of the Eurasian Oystercatcher (*Haematopus ostralegus longipes*).

These foreseen changes for the five populations of four species mean that no more hunting would be allowed under the Agreement, although they are huntable species under the Birds Directive since they are listed in Annex II, Part b of the Birds Directive. These amendments will thus require stronger legal protection than required under EU law.

If the proposed changes were accompanied by an asterisk "*", this would indicate that hunting of the species could continue on a sustainable use basis within the context of an international action plan implementing the principles of adaptive harvest management. Therefore, the European Union reservation with regard to this population could be lifted once an adaptive harvest management mechanism under an international body, consistent with the requirements of Article 7 of the Birds Directive, is in place. However, an asterisk "*" accompanies none of the proposed amendments.

All of the proposed amendments shall be approved on behalf of the European Union pursuant to article 218.9 TFUE. However, in line with Article 3(4) of Council Decision 2006/871/EC of 18 July 2005, the Commission shall enter a reservation with regard to the proposed amendments concerning the above mentioned five populations of four species, as it did for amendments with similar effects at the previous Meetings of the Parties, since they would require an amendment to the Birds Directive, which is not possible within ninety days of the date of their adoption by the Meeting of the Parties.

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*'[4].

4.1.2. Application to the present case

The Meeting of the Parties is a body set up by an agreement, namely the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

The act which the Meeting of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law and is capable of decisively influencing the content of European Union legislation, namely, the Birds Directive. This is because some actions, in particular as regards hunting, which the Parties shall undertake in relation to priority species listed in Table 1 of Annex 3 of the Agreement are not always compatible with what the Birds Directive provides for the same species. Namely, if a species listed in Annex II of the Birds Directive becomes no more huntable under AEWA, an amendment of the Birds Directive would be required.Under Article 3 of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, as regards matters falling within Community competence, the Commission is authorised to approve, on behalf of the Community, amendments to the Annexes to the Agreement adopted in accordance with Article X(5) of the Agreement. However, this authorization is limited to those amendments that are consistent with, and do not entail any modification of, Community legislation on the conservation of wild birds and their natural habitats.

Since the proposed amendments to Table 1 of Annex 3 of the Agreement concerning the following four species: Greylag Goose (*Anser anser*), the Red-crested Pochard (*Netta rufina*), the Grey Plover (*Pluvialis squatarola squatarola*) and the Eurasian Oystercatcher (*Haematopus ostralegus longipes*) would require an amendment to the Birds Directive, a Council decision is needed to establish the position to be taken on behalf of the European Union in the eighth Meeting of the Parties of the Agreement in that respect[5].

The envisaged act does 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

[4] 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] For amendments that would not require an amendment to the Birds Directive, the Commission may approve them in accordance with Council decision 2006/871/EC of 18 July 2005.

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) TFEU.

4.3. Conclusion

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

5. PUBLICATION OF THE ENVISAGED ACT

As the envisaged act of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds will amend its Annex 3, 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 Article 192(1), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement on the Conservation of African-Eurasian Migratory Waterbirds ('the Agreement') entered into force on 1 November 1999 and was approved on behalf of the European Community by Council Decision 2006/871/EC[6].

(2) Pursuant to Article X, paragraph 5, of the Agreement, the Meeting of the Parties may adopt amendments to Annexes of the Agreement.

(3) The Eighth Meeting of the Parties, on 5-8 October 2021, is expected to adopt a Resolution on the adoption of amendments to Annex 3 to the Agreement.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Meeting of the Parties, as the Resolution will be binding on the Union and capable of decisively influencing the content of Union law, namely the Birds Directive.

(5) The proposed amendments to Annex 3 to the Agreement submitted by the United Kingdom and set out in the draft Resolution 8.xx concerning the following four species: the Greylag Goose (*Anser anser*), the Red-crested Pochard *(Netta rufina*), the Grey Plover (*Pluvialis squatarola squatarola*) and the Eurasian Oystercatcher (*Haematopus ostralegus longipes*), which are not in line with the relevant EU legislation (Birds Directive), should be approved on behalf of the European Union, since they contribute to achieving a higher degree of protection of these species populations that are in decline. However, in accordance with Article 3(4) of Council Decision 2006/871/EC of 18 July 2005, the Commission should enter a reservation with regard to the proposed amendments concerning the above four species, since they would require an amendment to the Birds Directive, which is not possible within ninety days of the date of their adoption by the Meeting of the Parties.

[6] OJ L345, 8.12.2006, p. 24

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the eighth meeting of the Parties to the Agreement shall be the following:

The amendments to Annex 3 to the Agreement submitted by the United Kingdom and set out in the draft Resolution 8.xx of the eighth Meeting of the Parties to the Agreement concerning the following four species: the Greylag Goose (*Anser anser*), the Red-crested Pochard *(Netta rufina*), the Grey Plover (*Pluvialis squatarola squatarola*) and the Eurasian Oystercatcher (*Haematopus ostralegus longipes*), will be approved at the eighth Meeting of the Parties on behalf of the European Union.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President