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PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
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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 position to be taken on behalf of the European Union in the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emission trading systems to amend Annex I and II to the Agreement

Delegations will find attached document COM(2019) 427 final.

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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emission trading systems to amend Annex I and II 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 in the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems with a view to amending Annex I and II to the Agreement

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems

The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems ('the Agreement') aims to connect the EU Emissions Trading System (EU ETS) with the Swiss one, by allowing that allowances issued in one system can be traded and used for compliance in the other one, expanding the opportunities for climate change mitigation. The Agreement will enter into force on the 1 January following the exchange of the instruments of ratification or approval by the Parties.

2.2. Amendments to the Annexes

The Joint Committee, established by Article 12 of the Agreement, is responsible for administering the Agreement and ensuring its implementation. It can decide to adopt new annexes to the Agreement or amend existing ones. It can also discuss amendments to the Articles of the Agreement, facilitate the exchange of views on the Parties' legislation and conduct reviews of the Agreement.

The Joint Committee is a bilateral body composed by representatives of the Parties (the EU and Switzerland). Decisions taken by the Joint Committee shall be agreed by both Parties.

Article 13(2) of the Agreement provides that the Joint Committee may decide to adopt a new Annex or to amend an existing Annex to this Agreement. To ensure the compatibility between the linked emissions trading systems, Article 2 of the Agreement provides that the EU ETS and the Swiss ETS must meet the essential criteria set out in Annex I to the Agreement. In accordance with Article 10, either system can adopt provisions that are more stringent than the essential criteria set out in Annex I. The majority of the proposed amendments relate to the essential criteria in Annex I.

To allow for the entry into force of the Linking Agreement, Switzerland had to adopt domestic legislation to meet the essential criteria in their entirety, notably to include aviation in the Swiss ETS. A number of the proposed amendments to Annex I insert or correct the references to Swiss legislation.

Moreover, since the signature of this agreement, EU legislation relating to monitoring and reporting, verification and accreditation and the inclusion of aviation in the EU ETS has been amended.

Annex I is also amended to include additional essential criteria on the market stability reserve, market oversight and relevant cooperation. With regards to the essential criteria on the coverage of aviation activities and with a view to ensuring that flights between the EU and Switzerland are adequately covered, incoming flights from aerodromes in Switzerland to aerodromes in the EU will be exempted through delegated legislation so that, as from the date of entry into force of the linking agreement, the EU ETS will only cover flights from the EEA to aerodromes in Switzerland, whilst the Swiss ETS will cover flights from Switzerland to the

EEA, once the Linking Agreement enters into force. A new criterion on surrendering allowances of aviation operators clarifies enforcement across systems.

Both the EU and Switzerland will strengthen their respective systems for the next trading period post-2020. While EU legislation covering the period 2021 to 2030 has already entered into force, the legislative procedure for the period post-2020 is still ongoing in Switzerland. Relevant changes to the EU ETS for the period 2021 to 2030 are reflected in some of the proposed amendments to Annex I. To ensure the continued compatibility between the EU ETS and the Swiss ETS in the period 2021 to 2030, a chapeau is inserted in Annex I Part A on stationary installations. The chapeau calls for the revision of the essential criteria in a manner that preserves as a minimum the integrity of the respective domestic emission reductions commitments of the parties and the integrity and orderly functioning of their carbon markets, whereby carbon leakage and distortion of competition between the linked systems is to be avoided. Furthermore, amendments to the essential criteria relating to the cap, the use of international credits and the level of free allocation in the Swiss ETS confirm the compatibility of the systems.

An amendment to Annex I Part C on registries clarifies that emissions for the year 2020 may only be covered by allowances issued in the period from 2013 to 2020. Another amendment requires a minimum of 24 h delay between the initiation and execution of a transfer of allowances from one account to the other.

In view of the role of the Swiss authorities in executing auctions (Annex I Part D) on the Swiss market, it seems appropriate to keep authorities with market oversight functions informed on the methodology on the deviation of the auction clearing price from the relevant price of allowances on the secondary market, so as to ensure the integrity of the auctions.

Where appropriate, it is clarified that the references to legislation are those in force on the date of entry into force of this Agreement.

Finally, Annex II contains a chapeau text that clarifies that the link between the EU ETS and the ETS of Switzerland will be operationalised on a provisional basis as from May 2020, before the permanent registry link will be implemented.

2.3. The envisaged act of the Joint Committee

In its second meeting scheduled for December 2019, the Joint Committee is to adopt a decision pursuant to Article 13(2) of the Linking Agreement, by which Annex I and II to the Agreement will be amended ('the envisaged act').

The purpose of the envisaged act is to amend Annex I and II to the Linking Agreement to align them with the current legislation in the EU[1] and Switzerland. Amending Annex I will ensure the necessary compatibility of the two Emission Trading Systems, as required by Article 25 of Directive 2003/87/EC and introduce the correct legal references for each essential criterion. Amending Annex II provides for a temporary and provisional solution to link the registries of both systems, before the permanent registry link becomes operational.

[1] Regulation (EU) 2017/2392 of the European Parliament and of the Council of 13 December 2017 amending Directive 2003/87/EC to continue current limitations of scope for aviation activities and to prepare to implement a global market-based measure from 2021, OJ L 350, 29.12.2017; Decision (EU) 2015/1814 of the European Parliament and of the Council of 6 October 2015 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading scheme and amending Directive 2003/87/EC (Text with EEA relevance), OJ L 264, 9.10.2015; Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 (Text with EEA relevance) OJ L 76, 19.3.2018.

The envisaged act will become binding on the parties in accordance with Article 2 of the Agreement, which provides: 'The Emissions Trading Systems of the Parties … shall meet at least the essential criteria set out in Annex I'.

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

The Council Decision based on this proposal from the Commission determines the position of the European Union concerning the Decision of the Joint Committee to be taken in order to amend Annex I and II of the Linking Agreement.

The Linking Agreement was signed in 2017 and could, on the side of the EU, not take into account legal developments in the European Union, such as the review of the EU ETS Directive for the period after 2021, the market stability reserve and relevant legislation on aviation. Switzerland only adopted the relevant legislation that makes both systems compatible but also includes aviation as a sector under the Emission Trading System of Switzerland, in March 2019.

Without amending Annex I and II to the Linking Agreement, compatibility of both systems would not be ensured nor would it be possible to provide for the registry link between the ETS of Switzerland and the EU ETS.

The development of a well-functioning international carbon market through bottom-up linking of emissions trading systems is a long term policy goal of the EU and the international community, notably as a means to achieve the climate objectives of the Paris Agreement. In this respect, Article 25 of the Directive establishing the EU's Emissions Trading System (EU ETS) allows for the EU ETS to be linked with other emissions trading systems provided they are mandatory, have an absolute cap on emissions and are compatible, as it is the case with the Swiss system.

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*'[2].

4.1.2. Application to the present case

The Joint Committee is a body set up pursuant to Article 12 of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

[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.

The act which the Joint Committee is called upon to adopt constitutes an act having legal effects. The envisaged act has legal effects because it concerns amendments to Annex I and II to the Linking Agreement.

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 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 Article 191 TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 191 TFEU, in conjunction with Article 218(9) TFEU.

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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 191, in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems[3] ('the Agreement') was signed on 23 November 2017 in accordance with Council Decision (EU) 2017/2240[4].

(2) Pursuant to Article 13 of the Agreement, the Joint Committee may amend the Annexes to the Agreement.

(3) The Joint Committee, during its meeting on xx xxxx 2019, is to adopt the Decision regarding amending Annex I and II to the Agreement.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the Joint Committee, as the Annexes will be binding on the Union.

(5) Once the Joint Committee amends Annex I and II accordingly to take account of relevant legislative developments, including the relevant Swiss rules extending the Swiss ETS to aviation, it is considered that the conditions for linking set out in the Agreement are fulfilled and that, therefore, the Union should exchange its instrument of ratification as provided for in Article 21 of the Agreement.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf within the second meeting of the Joint Committee established by the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems, to amend Annex I and II to the Agreement, shall be to support the adoption by the Joint Committee of the amendments to Annex I and II set out in the Appendix to the draft Decision of the Joint Committee attached to this Decision.

Minor changes to the Annex may be agreed to by the representatives of the Union within the Joint Committee without a further decision of the Council.

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[3] OJ L 322, 7.12.2017, p. 3.

[4] OJ L 322, 7.12.2017, p. 1.

Article 2

This Decision is addressed to the Commission.

This Decision shall enter into force on the date of its adoption.

This Decision shall be published in the Official Journal of the European Union.

Done at Brussels,

For the Council
The President