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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 541 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union at the fifth meeting of the Conference of the Parties to the Minamata Convention on Mercury as regards the adoption of a Decision establishing a threshold for mercury waste, in accordance with Article 11, paragraph 2, of that Convention

Delegations will find attached document COM(2023) 541 final.

Encl.: COM(2023) 541 final

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Brussels, 22.9.2023
COM(2023) 541 final

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Proposal for a

COUNCIL DECISION

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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 fifth meeting of the Conference of the Parties to the Minamata Convention on Mercury (COP5) regarding the envisaged adoption of a Decision establishing thresholds for waste contaminated with mercury or mercury compounds (thereafter 'mercury contaminated waste'), as referred to Article 11, paragraph 2(c), of that Convention.

2. CONTEXT OF THE PROPOSAL

2.1. The Minamata Convention on Mercury

The Minamata Convention on Mercury ('the Agreement')[1] 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 entire life-cycle of mercury, from primary mercury mining to mercury waste disposal.

The Agreement entered into force on 16 August 2017.

The European Union is a party to the Agreement as well as all its Member States.

Article 11, paragraph 2 of the Agreement, stipulates that, for the purpose of this Agreement, 'mercury wastes' means substances or objects (a) consisting of or (b) containing or (c) contaminated with mercury or mercury compounds, in a quantity exceeding the thresholds to be defined by the Conference of the Parties, and which are disposed of or are intended or required to be disposed of in accordance with national law or the Agreement. This provision adds that this definition of 'mercury wastes' excludes mining waste (overburden, waste rock and tailings), except mining waste from primary mercury mining, containing mercury or mercury compounds in a quantity below the thresholds to be defined by the Conference of the Parties.

Article 11, paragraph 3, of the Agreement, specifies that waste qualifying as mercury waste under its Article 11, paragraph 2, must be managed in an environmentally sound manner ('ESM'). The COP, at its third meeting (25-29 November 2019)[2], adopted Decision MC-3/5[3], which provides as follows:

On the one hand, all wastes consisting of or containing mercury or mercury compounds are 'mercury wastes' within the meaning of Article 11(2) of the Agreement, irrespective of their

[1] The Minamata Convention on Mercury (Text and Annexes), https://mercuryconvention.org/en/documents/minamata-convention-mercury-text-and-annexes

[2] Third meeting of the Conference of the Parties to the Minamata Convention on Mercury (COP-3), Geneva, Switzerland, 25 – 29 November 2019, https://mercuryconvention.org/en/meetings/cop3

[3] Decision adopted by the third Conference of the Parties to the Minamata Convention on Mercury – MC-3/5 - Mercury waste thresholds, 7 January 2020, https://mercuryconvention.org/sites/default/files/documents/decision/UNEP-MC-COP3-Dec5-MercuryWasteThresholds.EN.pdf

content of mercury or mercury compounds. Regarding overburden and waste rock from mining other than primary mercury mining, there is no need to develop thresholds, which implies that they do fall under the scope of application of Article 11 of the Agreement.

On the other hand, concerning wastes contaminated with mercury or mercury compounds ('mercury contaminated wastes'), including for tailings from mining other than primary mercury mining ('mining tailings'), as no agreement could be reached by Parties, the group of technical experts, established by the COP at its second meeting (19-23 November 2018)[4], is to continue with discussions on applicable thresholds during the intersessional period leading to its fifth meeting.

2.2. The Conference of the Parties

The Conference of the Parties to the Agreement ('COP') performs the functions assigned to it by the Agreement and, to that end, shall consider and undertake *inter alia* any additional action that may be required for the achievement of the objectives of the Agreement, including the adoption of relevant guidelines.

According to Article 28 of the Agreement and Decision MC-1/1 on Rules of Procedures[5] adopted by the COP at its first meeting (24-29 September 2017)[6], 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 act of the Conference of the Parties

The group of technical experts established pursuant to decision MC-2/2[7], which received extended mandates by decisions MC-3/5 and MC-4/6[8], discussed threshold(s) for mercury wastes falling under sub-category 2 (c) of Article 11. After considering all the views expressed by the members, the group agreed to recommend to the Conference of the Parties to establish a threshold for mercury contaminated waste, presenting three possible threshold

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4 Second meeting of the Conference of the Parties to the Minamata Convention on Mercury (COP-2), Geneva, Switzerland, 19 – 23 November 2018 https://mercuryconvention.org/en/meetings/cop2

5 Decision adopted by the first Conference of the Parties to the Minamata Convention on Mercury - MC-1/1: Rules of procedure, 22 November 2017, https://mercuryconvention.org/sites/default/files/documents/decision/UNEP-MC-COP1-Dec1-RulesProcedure.EN.pdf

6 First meeting of the Conference of the Parties to the Minamata Convention on Mercury (COP-2), Geneva, Switzerland, 24 – 29 September 2017, https://mercuryconvention.org/en/meetings/cop1

7 Decision adopted by the second Conference of the Parties to the Minamata Convention on Mercury – MC-2/2: Mercury waste thresholds, 6 December 2018, https://mercuryconvention.org/sites/default/files/documents/decision/UNEP-MC-COP2-Dec2-MercuryWasteThresholds.EN.pdf

8 Decision adopted by the fourth meeting of the Conference of the Parties to the Minamata Convention on Mercury – MC-4/6: Mercury waste thresholds, 8 April 2022, https://mercuryconvention.org/en/documents/mercury-waste-thresholds-1

values for the COP to decide upon. The group agreed on other recommendations in relation to the threshold(s).

The above-cited intersessional expert work has resulted in a dedicated report developed by the Secretariat of the Convention[9], which includes recommendations to the COP on mercury waste thresholds for consideration and possible adoption at COP5.

The recommendations to the COP include the establishment of a threshold of [25] [15] [10] mg/kg total concentration of mercury for wastes contaminated with mercury or mercury compounds.

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

The proposed position to be taken on the Union's behalf is to support, at the fifth meeting of the COP, the adoption of an envisaged act that is consistent with the EU acquis.

In fact, whereas the envisaged act will complement Decision MC-3/5 by addressing another category of mercury waste, i.e., mercury contaminated waste, this proposed position is fully in line with the EU position adopted in view of COP3, which was instrumental in developing this Decision and already covered the issue of the threshold for such waste. Mercury waste is regulated at EU level, notably by the Mercury Regulation[10], by the Waste Framework Directive[11], by the Extractive Waste Directive[12] and by Commission Decision on the European list of waste[13].

EU waste law relies upon the key obligation set out in Articles 13 and 17 of Directive 2008/98/EC on waste according to which Member States shall take the necessary measures to ensure that waste management is carried out without endangering human health and without harming the environment. These provisions implement the ESM obligation set out in Article 11, paragraph 3, of the Agreement.

Indeed, whilst the EU was instrumental regarding the development of the Agreement, including its provisions on mercury waste, and whereas EU experts contributed significantly to the above-mentioned intersessional expert discussions, the EU acquis on waste goes beyond Article 11 of the Agreement as all mercury waste referred to in this provision are regulated at EU level and made subject to ESM, irrespective of their content in mercury or mercury compounds.

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[9] UNEP/MC/WT.2/L.1 Draft report of the meeting of the group of technical export on mercury waste threshold, available at: https://mercuryconvention.org/sites/default/files/inline-files/2_L1_meeting_report_final.pdf

[10] Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste

[11] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste

[12] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC7

[13] Commission Decision 2000/532/EC of 3 May 2000 replacing Decision 94/3/EC establishing a list of wastes pursuant to Article 1(a) of Council Directive 75/442/EEC on waste and Council Decision 94/904/EC establishing a list of hazardous waste pursuant to Article 1(4) of Council Directive 91/689/EEC on hazardous waste

A Union position is needed as, once adopted, the Parties to the Agreement shall have to implement the envisaged act. With regard the three proposed values, the EU should strive to find an agreement on a single value to be adopted by COP5. The EU can show flexibility on the final value.

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'[14].

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 envisaged act, which the COP is called upon to adopt, constitutes an act having legal effects, because Parties to the Agreement shall take measures to ensure that it is implemented and complied with.

The envisaged act does neither supplement nor amend the institutional framework of the Agreement. Therefore, the procedural legal basis for the proposed decision is Article 218(9) TFEU.

4.2. 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

[14] 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.

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 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.

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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 Minamata Convention on Mercury[15] ('the Agreement') was concluded by the Union by Council Decision (EU) 2017/939[16] 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 ('Conference of the Parties') 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 third meeting on 25-29 November 2019, adopted Decision MC-3/5 setting thresholds for waste consisting of or containing mercury or mercury compounds, as referred to in Article 11, paragraph 2, of the Agreement, and requiring the group of technical experts, established by the Conference of the Parties at its second meeting on 19-23 November 2018, to develop thresholds for waste contaminated with mercury or mercury compounds ('mercury contaminated waste'), including for tailings from mining other than primary mercury mining.

(4) The Conference of the Parties, during the second segment of its fourth meeting on 21-25 March 2022, was not able to adopt a Decision on thresholds for mercury contaminated waste, as referred to in Article 11, paragraph 2 (c), of the Agreement. Rather, Decision MC-4/6 requested the group of technical experts to continue its work

[15] 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

[16] 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).

primarily by electronic means and to hold one face-to-face meeting of sufficient duration to address mercury wastes falling under paragraph 2 (c) of article 11, subject to the availability of resources, and to report on its work to the Conference of the Parties at its fifth meeting.

(5) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties, as this proposed Decision, if approved, will have legal effects since the Parties to the Agreement will have to take measures to implement it at national and/or regional levels.

(6) The Union contributed significantly to the development of the waste provisions of the Agreement and to the intersessional expert work launched by Decision MC-3/5 and that has led to the recommendations; whereas the Union acquis requires already that all mercury waste referred to in Article 11, paragraph 2, of the Agreement, including mercury contaminated waste, be managed without endangering human health and without harming the environment, irrespective of their mercury content.

(7) The Union should only support the adoption of a Decision by the Conference of the Parties that is consistent with the Union acquis.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the fifth meeting of the Conference of the Parties to the Agreement shall be to support the adoption of a Decision on thresholds for contaminated mercury waste that is consistent with the Union acquis.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President