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PROPOSAL

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
date of receipt:	3 November 2023
To:	Ms Thérèse BLANCHET, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2023) 696 final
Subject:	Proposal for a COUNCIL DECISION on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex XX (Environment) to the EEA Agreement (ETS Maritime and Stationary)

Delegations will find attached document COM(2023) 696 final.

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Brussels, 3.11.2023
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2023/0392 (NLE)

Proposal for a

COUNCIL DECISION

**on the position to be adopted, on behalf of the European Union, within the EEA Joint
Committee concerning an amendment to Annex XX (Environment) to the EEA
Agreement**

(ETS Maritime and Stationary)

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be adopted on the Union's behalf in the EEA Joint Committee in connection with the envisaged adoption of the Joint Committee Decision concerning an amendment of Annex XX (Environment) to the EEA Agreement

2. CONTEXT OF THE PROPOSAL

2.1. The EEA Agreement

The Agreement on the European Economic Area (*'the EEA Agreement'*) guarantees equal rights and obligations within the Internal Market for citizens and economic operators in the EEA. It provides for the inclusion of EU legislation covering the four freedoms throughout the 30 EEA States comprising of EU Member States, Norway, Iceland and Liechtenstein. In addition, the EEA Agreement covers cooperation in other important areas such as research and development, education, social policy, the environment, consumer protection, tourism and culture, collectively known as "*flanking and horizontal*" policies. The EEA Agreement entered into force on 1 January 1994. The Union together with its Member States is a party to the EEA Agreement.

2.2. The EEA Joint Committee

The EEA Joint Committee is responsible for the management of the EEA Agreement. It is a forum for exchanging views linked to the functioning of the EEA Agreement. Its decisions are taken by consensus and are binding on the Parties. The responsibility for coordinating EEA matters on the EU side is with the Secretariat General of the European Commission.

2.3. The envisaged act of the EEA Joint Committee

The EEA Joint Committee is expected to adopt the EEA Joint Committee Decision (*'the envisaged act'*) regarding the amendment of Annex XX (Environment) to the EEA Agreement.

The purpose of the envisaged act is to incorporate into the EEA Agreement Regulation (EU) 2023/957 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types¹, Directive (EU) 2023/959 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system², Decision (EU) 2023/852 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability

¹ Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types, OJ L 130, 16.5.2023, p. 105.

² Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, p. 134.

reserve for the Union greenhouse gas emission trading system until 2030³, and Commission Decision (EU) 2023/1575 on the Union-wide quantity of allowances to be issued under the EU Emissions Trading System for 2024⁴.

The envisaged act will become binding on the parties in accordance with Articles 103 and 104 of the EEA Agreement.

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

The Commission submits the annexed draft Decision of the EEA Joint Committee for adoption by the Council as the Union's position. The position, once adopted, should be presented in the EEA Joint Committee at the earliest possible opportunity.

The annexed draft Decision of the EEA Joint Committee provides for a specific review clause relating to application of Chapter IVa of Directive 2003/87/EC and, until the outcome of that review, Chapter IVa's permitting and monitoring rules will not apply to Liechtenstein. This goes beyond what can be considered mere technical adaptations in the sense of Council Regulation No 2894/94⁵. The Union position shall therefore be established by the Council.

The specific circumstances of Liechtenstein justify this adaptation, as Liechtenstein has a bilateral treaty with Switzerland by which it first sets the same CO₂ tax level as the CO₂ tax of Switzerland (currently €120 per tonne CO₂) and, second, by which it sets out that the CO₂ tax is administered completely by Swiss authorities, including tax collection at the border between Liechtenstein and Austria, and paid by Swiss entities. This is because all fuel deliveries come from Switzerland, and fuel storage is done by Swiss entities. Therefore, there is a Liechtenstein-specific review for the duration of the ETS2 surrendering derogation, in case national carbon taxes are effectively higher than the ETS2 price at the time of the next Joint Committee Decision on incorporating amendments to Directive 2003/87/EC. This is expected following the indicative July 2026 review of Directive 2003/87/EC outlined in Article 30. Before that Joint Committee Decision enters into force, the permitting, monitoring and reporting provisions for regulated entities would not apply to Liechtenstein.

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

³ Decision (EU) 2023/852 of the European Parliament and of the Council of 19 April 2023 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability reserve for the Union greenhouse gas emission trading system until 2030, OJ L 110, 25.4.2023, p. 21.

⁴ Commission Decision (EU) 2023/1575 of 27 July 2023 on the Union-wide quantity of allowances to be issued under the EU Emissions Trading System for 2024, OJ L 192, 31.7.2023, p. 30.

⁵ Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area, OJ L 305, 30.11.1994, p. 6.

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*’⁶.

4.1.2. Application to the present case

The EEA Joint Committee is a body set up by an agreement, namely the EEA Agreement. The act, which the EEA Joint Committee is called upon to adopt, constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Articles 103 and 104 of the EEA 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 in conjunction with Article 1(3) of Council Regulation No 2894/94.

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU in conjunction with Article 1(3) of Council Regulation No 2894/94 depends primarily on the substantive legal basis of the EU legal act to be incorporated into the EEA Agreement.

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

Since the Joint Committee Decision incorporates into the EEA Agreement Regulation (EU) 2023/957, Directive (EU) 2023/959, Decision (EU) 2023/852 and Commission Decision (EU) 2023/1575, it is appropriate to base this Council decision on the same substantive legal base as the acts that are incorporated. Therefore, the substantive legal basis of the proposed decision is Article 192(1) of the TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 192(1) TFEU, in conjunction with Article 218(9) TFEU and Article 1(3) of Council Regulation No 2894/94.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the EEA Joint Committee will amend Annex XX (Environment) to the EEA Agreement, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

⁶ 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.

Proposal for a

COUNCIL DECISION

on the position to be adopted, on behalf of the European Union, within the EEA Joint Committee concerning an amendment to Annex XX (Environment) to the EEA Agreement

(ETS Maritime and Stationary)

(Text with EEA relevance)

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 Council Regulation (EC) No 2894/94 of 28 November 1994 concerning arrangements for implementing the Agreement on the European Economic Area⁷, and in particular Article 1(3) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) The Agreement on the European Economic Area⁸ ('the EEA Agreement') entered into force on 1 January 1994.
- (2) Pursuant to Article 98 of the EEA Agreement, the EEA Joint Committee may decide to amend, inter alia, Annex XX (Environment) to the EEA Agreement.
- (3) Regulation (EU) 2023/957 of the European Parliament and of the Council⁹, Directive (EU) 2023/959 of the European Parliament and of the Council¹⁰, Decision (EU)

⁷ OJ L 305, 30.11.1994, p. 6.

⁸ OJ L 1, 3.1.1994, p. 3.

⁹ Regulation (EU) 2023/957 of the European Parliament and of the Council of 10 May 2023 amending Regulation (EU) 2015/757 in order to provide for the inclusion of maritime transport activities in the EU Emissions Trading System and for the monitoring, reporting and verification of emissions of additional greenhouse gases and emissions from additional ship types, OJ L 130, 16.5.2023, p. 105.

¹⁰ Directive (EU) 2023/959 of the European Parliament and of the Council of 10 May 2023 amending Directive 2003/87/EC establishing a system for greenhouse gas emission allowance trading within the Union and Decision (EU) 2015/1814 concerning the establishment and operation of a market stability reserve for the Union greenhouse gas emission trading system, OJ L 130, 16.5.2023, p. 134.

2023/852 of the European Parliament and of the Council¹¹ and Commission Decision (EU) 2023/1575¹² should be incorporated into the EEA Agreement.

- (4) Annex XX (Environment) to the EEA Agreement should therefore be amended accordingly.
- (5) The position of the Union within the EEA Joint Committee should therefore be based on the attached draft Decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be adopted, on behalf of the Union, within the EEA Joint Committee on the proposed amendment to Annex XX (Environment) to the EEA Agreement, shall be based on the draft decision of the EEA Joint Committee attached to this Decision.

Article 2

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

Done at Brussels,

For the Council
The President

¹¹ Decision (EU) 2023/852 of the European Parliament and of the Council of 19 April 2023 amending Decision (EU) 2015/1814 as regards the number of allowances to be placed in the market stability reserve for the Union greenhouse gas emission trading system until 2030, OJ L 110, 25.4.2023, p. 21.

¹² Commission Decision (EU) 2023/1575 of 27 July 2023 on the Union-wide quantity of allowances to be issued under the EU Emissions Trading System for 2024, OJ L 192, 31.7.2023, p. 30.