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PROPOSAL

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To:	Ms Thérèse BLANCHET, 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 on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade as regards certain amendments to the Convention and its Annex III

Delegations will find attached document COM(2023) 42 final.

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EUROPEAN
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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 on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade as regards certain amendments to the Convention and its Annex III

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 Conference of the Parties to the Rotterdam Convention on the Prior Informed Consent Procedure for certain hazardous chemicals and pesticides in international trade in connection with the envisaged adoption of decisions to amend Annex III by adding acetochlor, carbosulfan, chrysotile asbestos, fenthion (ultra low volume (ULV) formulations at or above 640 g active ingredient/L), iprodione, liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L, and terbufos.

In addition, this proposal concerns the decision establishing the position to be taken on the Union's behalf in the Conference of the Parties to the Rotterdam Convention in connection with the proposal to amend the Convention submitted by Switzerland, Australia and Mali.

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 certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use. The Convention entered into force on 24 February 2004.

The European Union is a party to the Convention¹.

2.2. The Conference of the Parties

Established pursuant to Article 18 of the Convention, the Conference of the Parties (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 (CRC).

In accordance with Article 5(1) of the Convention, Parties are required to submit notifications of final regulatory action taken to ban or severely restrict the use of a chemical at national level. After receipt by the Secretariat of two such notifications on the same chemical from two Parties belonging to two different PIC regions, those notifications will be presented to the CRC. The CRC is to review those notifications against the criteria laid down in Annex II to the Convention and to adopt a recommendation as regards the listing of the respective chemical for consideration by the COP.

In addition, any Party that is a developing country or a country with an economy in transition and that is experiencing problems caused by a severely hazardous pesticide formulation (SHPF) under conditions of use in its territory can propose to list that severely hazardous pesticide formulation in Annex III to the Convention in accordance with Article 6(1). The CRC is to review those proposals against the criteria laid down in Annex IV to the Convention and to adopt a recommendation as regards the listing of the respective SHPF for consideration by the COP.

¹ Council Decision 2006/730/EC 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).

The procedure for adoption of amendments to the Convention is governed by Article 21 of the Convention, and the procedure for adoption and amendment of Annexes by Article 22. In accordance with Article 23 of the 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 acts of the Conference of the Parties

At the eleventh ordinary meeting, the Conference of the Parties will consider the adoption of decisions to list acetochlor, carbosulfan, chrysotile asbestos, fenthion (ultra low volume (ULV) formulations at or above 640 g active ingredient/L), iprodione, liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L, and terbufos in Annex III to the Convention.

The listing in Annex III has the effect that the chemicals will be subject to the Prior Informed Consent Procedure when internationally traded. This will require Parties to submit import responses to the Secretariat so that the Secretariat can make those import responses available to all Parties. Exporting Parties will be required to respect the import responses when exporting those chemicals.

The envisaged acts will become binding on the Parties in accordance with Article 22(5)(c) of the Convention, which provides: *‘A decision to amend Annex III shall forthwith be communicated to the Parties by the Depositary. The amendment shall enter into force for all Parties on a date to be specified in the decision’*.

In addition, the Conference of the Parties will consider a proposal submitted by Switzerland, Australia and Mali to amend Articles 7, 10, 11 and 22 of the Rotterdam Convention and to add a new Annex VIII. Depending on the discussions at the Conference of the Parties, the proposal may need to be modified. The proposed amendments will establish a mechanism to regulate the export of those chemicals that are recommended for listing in Annex III by the CRC, but on which the Conference of the Parties did not yet reach consensus on their listing in Annex III.

The listing in Annex VIII together with the corresponding rules on the export of the respective chemicals will apply for all Parties that ratify the amendment until that chemical is listed in Annex III. The decision on the listing in Annex VIII will be made by consensus, with the possibility to decide by a three-fourths majority vote of the Parties present and voting at the meeting, if all efforts to achieve consensus have been exhausted.

The envisaged amendment will become binding on the Parties in accordance with Article 21(5) of the Convention, which provides: *‘Ratification, acceptance or approval of an amendment shall be notified to the Depositary in writing. An amendment adopted in accordance with paragraph 3 shall enter into force for the Parties having accepted it on the ninetieth day after the date of deposit of instruments of ratification, acceptance or approval by at least three fourths of the Parties. Thereafter, the amendment shall enter into force for any other Party on the ninetieth day after the date on which that Party deposits its instrument of ratification, acceptance or approval of the amendment’*. Consequently, once the amendment is adopted and communicated to the Union by the depositary, the Union would need to take steps to approve this amendment under Article 21(5) of the Convention and notify it to the depositary.

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

The position to be taken on the Union's behalf at the eleventh meeting of the Conference of the Parties to the Rotterdam Convention should be to support the listing of acetochlor, carbosulfan, chrysotile asbestos, fenthion (ultra low volume (ULV) formulations at or above 640 g active ingredient/L), iprodione, liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L, and terbufos in Annex III in line with the relevant recommendations of the Chemical Review Committee (CRC).

In accordance with Article 5(1) of the Convention, Parties had submitted notifications of final regulatory action taken to ban or severely restrict the use of acetochlor, carbosulfan, chrysotile asbestos, iprodione and terbufos at national level.

In addition, Parties had submitted proposals to list fenthion (ultra low volume (ULV) formulations at or above 640 g active ingredient/L) and liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L, in Annex III to the Convention in accordance with Article 6(1).

The CRC reviewed the notifications against the criteria laid down in Annex II and the proposals against the criteria laid down in Annex IV to the Convention and concluded that all relevant criteria are met.

The listing in Annex III has the effect that the chemicals will be subject to the Prior Informed Consent Procedure when internationally traded. This will require Parties to submit import responses to the Secretariat so that the Secretariat can make those import responses available to all Parties. Exporting Parties will be required to respect the import responses when exporting those chemicals.

The position to be taken on the Union's behalf at the eleventh meeting of the Conference of the Parties to the Rotterdam Convention as regards the proposal submitted by Switzerland, Australia and Mali should be to advocate an amendment that would introduce a voting mechanism for the listing of chemicals in Annex III. Taking into account the experience from discussions with other Parties, it seems that only few Parties would support such an amendment. Therefore, the alternative position should be to support in principle the proposal submitted by Switzerland, Australia and Mali, provided that the following conditions are met:

- (a) there is no sufficient support by other Parties for an amendment of the decision-making procedure for listing in Annex III that would introduce the possibility to vote in accordance with Article 22(4) read in conjunction with Article 22(3), but without the application of Article 22(3)(b) of the Convention,
- (b) the additional rules and procedures introduced by the amendment are coherent with the existing rules and procedures under the Convention,
- (c) the amendments ensure that preference is given to the listing in Annex III and that the additional rules do not interfere with the listing in Annex III, including any listing in Annex III decided when a chemical is already listed in Annex VIII,
- (d) the amendments ensure that the rules as regards the protection of importing countries that will apply to the export of chemicals listed in Annex VIII will be stricter than those that apply to the export of chemicals listed in Annex III,
- (e) the amendment ensures that all Parties that ratify the amendment will be bound by any decision to list a chemical in Annex VIII, including any decision that is taken by a vote.

The proposal is coherent with and complements the implementation of Regulation (EU) No 649/2012, which implements the Rotterdam Convention in the Union. It is fully in line with the objective of the Convention to promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use.

The proposal is coherent with Regulation (EC) No 1107/2009, Regulation (EU) No 528/2012 and Regulation (EC) No 1907/2006 since it does not interfere with any decisions on the placing on the market of chemicals in the European Union.

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 Conference of the Parties 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 acts, which the Conference of the Parties is called upon to adopt, constitute acts having legal effects. The envisaged acts to amend Annex III will be binding under international law in accordance with Article 22 of the Rotterdam Convention and will need to be implemented in Regulation (EU) No 649/2012. The act to amend the Convention as proposed by three Parties is capable of decisively influencing the content of EU legislation, namely Regulation (EU) No 649/2012. This is because the amendment to the Convention would have to be implemented in Union legislation, if the Union decides to ratify the amendment.

The envisaged acts to amend Annex III do not supplement or amend the institutional framework of the Agreement.

The envisaged act to either amend the rules on adoption of an amendment of Annex III (Article 22(5)) or to amend Articles 7, 10, 11 and 22 and introduce a new Annex VIII (list of chemicals subject to explicit consent) does neither amend nor supplement the institutional framework of the Convention, since it either only changes the rules for amending Annex III or it only adds to the Convention an additional possibility to list chemicals that will become subject to explicit consent of the importing party for their export, pending their listing in Annex III.

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

With regard to an envisaged act that simultaneously pursues a number of objectives, or that has several components, which are inseparably linked without one being incidental to the other, the substantive legal basis of a decision under Article 218(9) TFEU will have to include, exceptionally, the various corresponding legal bases.

4.2.2. Application to the present case

The envisaged acts pursue objectives and have components in the area of ‘environment’ and ‘trade’. These elements of the envisaged acts are inseparably linked without one being incidental to the other.

Therefore, the substantive legal basis of the proposed decision comprises the following provisions: Articles 192(1) and 207(3) and the first subparagraph of Article 207(4) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Articles 192(1) and 207(3) and the first subparagraph of Article 207(4), in conjunction with Article 218(9) TFEU.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Conference of the Parties will amend the Rotterdam Convention, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

COUNCIL DECISION

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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) and the first subparagraph of Article 207(4), 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 by the Union by Council Decision (2006/730/EC)³ and entered into force on 24 February 2004.
- (2) Pursuant to Article 7 of the Convention, the Conference of the Parties may adopt decisions to list chemicals in Annex III.
- (3) At its eleventh meeting, the Conference of the Parties is expected to adopt decisions to list further chemicals in Annex III to the Convention.
- (4) To promote shared responsibility and cooperative efforts among Parties in the international trade of certain hazardous chemicals in order to protect human health and the environment from potential harm and to contribute to their environmentally sound use it is necessary to list further chemicals that were found to meet all relevant criteria in Annex III to the Convention.
- (5) Furthermore, the Conference of the Parties will consider a proposal for amending the Convention submitted by Switzerland, Australia and Mali. That proposal aims at addressing the difficulty to list new chemicals in Annex III to the Convention originating from the need to achieve consensus for a decision to amend Annex III in accordance with Article 22(5) of the Convention.
- (6) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties, as the decisions will be binding on the Union or capable of decisively influencing the content of Union law, namely Regulation (EU) No 649/2012 of the European Parliament and of the Council⁴.

³ Council Decision 2006/730/EC 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).

⁴ Regulation (EU) No 649/2012 of the European Parliament and of the Council of 4 July 2012 concerning the export and import of hazardous chemicals (OJ L 201, 27.7.2012, p. 60).

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf at the eleventh meeting of the Conference of the Parties to the Convention and any subsequent Conference of the Parties where the point is on the agenda shall be that the Union shall support the adoption of the amendments to Annex III to the Convention as regards the inclusion of acetochlor, carbosulfan, chrysotile asbestos, fenthion (ultra low volume (ULV) formulations at or above 640 g active ingredient/L), iprodione, liquid formulations (emulsifiable concentrate and soluble concentrate) containing paraquat dichloride at or above 276 g/L, corresponding to paraquat ion at or above 200 g/L, and terbufos.

Article 2

The position to be taken on the Union's behalf at the eleventh meeting of the Conference of the Parties to the Convention and any subsequent Conference of the Parties where the point is on the agenda shall be that the Union shall advocate an amendment that would introduce a voting mechanism for the listing of chemicals in Annex III to the Convention. The alternative position shall be to support the adoption of the amendments submitted by Switzerland, Australia and Mali (document XXX), provided that the following conditions are met and necessary amendments are made to that effect:

- (a) there is no sufficient support by other Parties for an amendment of the decision-making procedure for listing chemicals in Annex III that would introduce the possibility to vote in accordance Article 22(4) read in conjunction with Article 22(3), but without the application of Article 22(3), point (b), of the Convention,
- (b) the additional rules and procedures introduced by the amendments are coherent with the existing rules and procedures under the Convention,
- (c) the amendments ensure that preference is given to the listing of chemicals in Annex III to the Convention and that the additional rules do not interfere with the listing of a chemical in Annex III, including when that chemical will have been already listed in Annex VIII to the Convention,
- (d) the amendments ensure that the rules that will apply to the export of chemicals listed in Annex VIII to the Convention will not be weaker as regards the protection of importing Parties than those that apply to the export of chemicals listed in Annex III to the Convention,
- (e) the amendments ensure that all Parties that ratify the amendment will be bound by any decision to list a chemical in Annex VIII to the Convention, including any decision that is taken by a vote.

Article 3

Refinements of the position referred to in Articles 1 and 2, in light of the developments at the eleventh meeting of the Conference of the Parties to the Convention and any subsequent Conference of the Parties where the point is on the agenda, may be agreed upon by representatives of the Union, in consultation with the Member States, during on-the-spot coordination meetings without a further decision of the Council.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*