Council of the European Union

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**PROPOSAL**

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| From: | Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director |
| date of receipt: | 24 February 2022 |
| To: | Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union |
| No. Cion doc.: | COM(2022) 67 final |
| Subject: | Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union at the 15th Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with regard to certain amendments of Article 6(2) in that Convention |

Delegations will find attached document COM(2022) 67 final.

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EUROPEAN
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Brussels, 24.2.2022
COM(2022) 67 final

2022/0046 (NLE)

Proposal for a

# COUNCIL DECISION

**on the position to be taken on behalf of the European Union at the 15th Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with regard to certain amendments of Article 6(2) in that Convention**

# EXPLANATORY MEMORANDUM

## 1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision establishing the Union's position at the 15th meeting of the Conference of the Parties to the Basel Convention, with respect to a proposal to change Article 6 of this Convention. The meeting is scheduled to take place in June 2022.

## 2. CONTEXT OF THE PROPOSAL

### 2.1. The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') was adopted on 22 March 1989 and entered into force in 1992. The European Union as well as its Member States are Parties to the Convention[1]. The Convention has 188 Parties.

The Convention's cornerstone is a control system for the export, import and transit of certain waste, through the procedure of "prior informed consent". Exports of waste subject to the Convention shall be notified in advance to the competent authorities of the States of import and transit. The notifications shall be made in writing and shall contain the declarations and information specified in Annex V A to the Convention. A waste export may only proceed if and when all States concerned have given their written consent (Article 6 of the Convention).

The Convention's control system applies to hazardous waste defined in Article 1 and listed in Annex VIII to the Convention, as well as to waste listed in Annex II, which contains waste collected from households, residues arising from the incineration of household waste and certain plastic waste. The Convention also lists waste entries in Annex IX which do not fall within its scope and control system unless such waste contains a material belonging to a category in Annex I to an extent causing it to exhibit a hazardous characteristic in Annex III.

### 2.2. The Conference of the Parties

The Conference of the Parties to the Basel Convention is the principal decision-making body of the Convention. It has powers to amend the Annexes to the Convention and it meets every two years.

The fifteenth meeting of the Conference of the Parties to the Basel Convention (CoP15) is being held in two segments: a first online segment took place from 26 to 30 July 2021 and the meeting will be resumed during a face-to-face segment in Geneva, from 6 to 17 June 2022.

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[1] Council Decision 93/98/EEC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal, OJ L 39, 16.2.1993, p. 1.

2.3. The proposed amendment to the Convention

The Russian Federation tabled a proposal for consideration at the 15th meeting of the Conference of the Parties, designed to amend the first sentence of paragraph 2 of Article 6 of the Convention ('the envisaged act')[2].

The first sentence of Article 6(2) of the Convention reads as follows: "*The State of import shall respond to the notifier in writing, consenting to the movement with or without conditions, denying permission for the movement, or requesting additional information*".

This envisaged act proposes to change this sentence through the addition of a time limit of 30 days within which a country of import should respond to the notifier (to consent to the planned shipment, deny its permission to this shipment, or to request additional information). In addition, the proposal consists in deleting the "," between "*conditions*" and "*denying*", to replace the comma with "*or*".

The Convention is implemented in the Union through Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste[3] ("the WSR" hereafter). Any modifications to the Convention would come into effect in the EU after they have been implemented through amendments of this Regulation.

The current rules applying to the Union and its Member States already foresee a 30 days deadline for the importing country to respond to the notifier (see Article 8 of the WSR). This also applies to other OECD countries, as per the OECD Decision[4].

For the Union, the only practical consequence of the changes linked to the Russian Federation proposal would relate to the procedure for the export of notified waste to non-OECD countries. As export of Annex VIII and Annex II waste to non-OECD countries is banned under the WSR, the change triggered by the Russian proposal would only relate to "unlisted waste" (i.e. with the Russian proposal, non-OECD countries importing unlisted waste from the EU would have to respond to the notifier within 30 days), which, under Article 3(1)(b)(iii) and (iv) of the WSR, are subject to the procedure of "prior informed consent". The amendment proposed by the Russian Federation would mean that, for these cases, the importing country would have to respond within 30 days to the notifier of a shipment from the Union destined to a non-OECD country.

The procedure for amending the Convention is governed by Article 17 of the Convention. Any such amendment must be adopted at a meeting of the Conference of the Parties. An amendment becomes binding on those Parties that deposit their instruments of ratification, approval, formal confirmation or acceptance in accordance with Article 17(5) of the Convention, which provides: "*Instruments of ratification, approval, formal confirmation or acceptance of amendments shall be deposited with the Depositary. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between Parties having accepted them on the ninetieth day after the receipt by the Depositary of their instrument of ratification, approval, formal confirmation or acceptance by at least three-fourths of the*

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2 The proposal is available on the website of the Basel Convention, see http://www.basel.int/TheConvention/Communications/tabid/1596/Default.aspx

3 OJ L 190, 12.7.2006, p. 1.

4 Decision on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0266

*Parties who accepted them or by at least two thirds of the Parties to the protocol concerned who accepted them, except as may otherwise be provided in such protocol. The amendments shall enter into force for any other Party on the ninetieth day after that Party deposits its instrument of ratification, approval, formal confirmation or acceptance of the amendments*". There is therefore a need for a ratification, approval, formal confirmation or acceptance by three quarters of the Parties to the Convention (so 141 Parties) for any amendment of the Convention to enter into force.

So far, the body of the Convention has been amended once, through the addition of an Article 4A and of a subsequent addition of an Annex VII ("the Basel Ban amendment") to the Convention. This amendment was agreed by the Conference of the Parties at its third meeting in 1995 and it entered into force in 2019, for those Parties that have ratified it.

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

(1) The Union should not support the amendment of paragraph 2 of Article 6 of the Convention as proposed by the Russian Federation.

(2) The first part of the amendment (30 days time limit for the importing country to respond to the notifier) would not bring any major change for the Union and its Member States, as the time limit of 30 days for importing countries to respond to the notifier contained in the proposed amendment already applies to the majority of shipments notified by the EU and its Member States under Union law (with the exception of exports of unlisted waste to non-OECD countries). Neither would it change obligations for the EU/and its Member States receiving notifications, as the time limit of 30 days to respond already applies under Union law.

(3) The second part of the amendment (replacing a comma with "or") does not seem necessary and would create legal uncertainty. The current formulation is sufficiently clear that the importing country can react in three different manners when responding to the notifier (consenting to the movement, denying the permission to this movement, or requesting additional information). There is therefore no need to amend this sentence.

(4) The process relating to amending the Convention is very burdensome and time consuming, especially as it requires each Party to proceed with its internal ratification process and a threshold of three quarters of all Parties to ratify if before the amendment enters into force. This amendment might also in the end have a limited impact, as amendments are only binding on those who have ratified them. The proposed amendment therefore would not address improving the effectiveness of the Convention in an efficient way as it would launch a lengthy and heavy process within the Convention and for its Parties.

(5) While not supporting the proposed amendments, the Union should stress that Parties should promote a better functioning of the notification procedure, within the framework of the Basel Convention. This could include the establishment of other time limits for responses to notifiers, notably for transit countries, as well as encouraging the use of electronic data interchange systems or incorporating the concept of "pre-consented facilities", which stems from the OECD Decision on transboundary movements of waste, into the Basel Convention framework. There are

a number of processes ongoing in the Convention already on these issues, which are useful but have so far delivered only limited results. The Union should underline the importance of these issues and explore if they could be addressed at as part of existing or new initiatives, which would not imply a change to the Convention. The Union should show openness towards such possible initiatives.

(6) Finally, it should be noted that the adoption of the proposed amendment, while not having clear added-value, would not prejudice the Union's interests either.

## 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*'[5].

#### 4.1.2. Application to the present case

The Conference of the Parties to the Basel Convention is a body set up by the Convention.

The act which the Conference of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law in accordance with Article 18 of the Convention. It is capable of influencing the content of EU legislation, namely Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste. This Regulation implements the Convention by, *inter alia*, laying down the procedures for exports from and imports to the Union as well as shipments between Member States.

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

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[5] Judgment of the Court of Justice of 7 October 2014, Germany v Council, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61to 64.

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 the protection of the 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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# COUNCIL DECISION

## on the position to be taken on behalf of the European Union at the 15th Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal with regard to certain amendments of Article 6(2) in that Convention

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 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal ('the Convention') entered into force in 1992 and was approved by the Union by Council Decision 93/98/EEC concerning the conclusion, on behalf of the Community, of the Basel Convention of 22 March 1989 on the control of transboundary movements of hazardous wastes and their disposal[6].

(2) Pursuant to Article 15(5)(b) of the Convention, the Conference of the Parties shall consider and adopt, as required, amendments to the Convention.

(3) The Conference of the Parties, during its 15th meeting in June 2022, is to consider the adoption of amendments of Article 6(2) of the Convention submitted by the Russian Federation. That proposal aims to establish a 30 days time limit for an importing country to respond to the notifier of a shipment of waste and to include another change presented as editorial.

(4) It is necessary to establish the position to be taken on the Union's behalf at the Conference of the Parties on this proposal, as, being an amendment to the text of the Convention, it has legal effects. If adopted by the Conference of the Parties, this act would be binding on the Union and impact the content of Union law, namely Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste[7].

(5) The Union should not support the above amendments of the Convention since this would require a long and heavy process to enter into force and it seems disproportionate to launch such process for an amendment, the objectives of which

[6] OJ L 39, 16.2.1993, p. 1.
[7] OJ L 190, 12.7.2006, p. 1.

could be achieved by other means. The Union should rather be open to initiatives designed to improve the functioning of the procedure of "prior informed consent", on the conditions that they have a broader scope than the proposal submitted to CoP15, are in line with broad Union policies and objectives and do not require an amendment to the Convention. It should be noted that the adoption of the proposed amendment, while not having clear added-value, would not prejudice the Union's interests either.

HAS ADOPTED THIS DECISION:

*Article 1*

1. The position to be taken on the Union's behalf at the 15th meeting of the Conference of the Parties to the Basel Convention shall be that it will not support the amendments to paragraph 2 of Article 6 of the Convention, as submitted by the Russian Federation.

2. Should other proposals to improve the functioning of the procedure of "prior informed consent" be submitted at the 15th meeting of the Conference of the Parties to the Basel Convention, the Union shall support such proposals subject to the following conditions :

(a) they are designed to improve the functioning of that procedure, by addressing the delays and problems experienced by States of export, transit or import to handle notifications and supporting the digitalisation of the procedure of "prior informed consent", so that waste can be shipped across borders without undue delay, when the shipments in question are compliant with the provisions of the Convention, without necessitating a change to the Convention;

(b) they contribute to the environmentally sound management of waste and to the transition towards a global circular economy; and

(c) they support the proper implementation of the control mechanisms laid down in the Convention and contribute to legal clarity in that regard.

*Article 2*

Refinement of the position referred to in Article 1 may be agreed to, in the light of developments at the 15th meeting of the Conference of the Parties, 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 3*

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council*
*The President*