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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
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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 emissions trading systems, as regards amendments to Annex I and clarification in Annex IV of the Agreement

Delegations will find attached document COM(2023) 197 final.

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Brussels, 17.4.2023
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Proposal for a

COUNCIL DECISION

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(Text with EEA relevance)

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 in connection with the envisaged adoption of a decision as regards the post-2021 amendment of Annex I and clarification in Annex IV 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 allowances issued in one system can be traded and used for compliance in the other one, thus expanding the opportunities for climate change mitigation. The Agreement entered into force on 1 January 2020.

2.2. The Joint Committee

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 of representatives of the Parties (the EU and Switzerland). Decisions taken by the Joint Committee shall be agreed by both Parties.

2.3. The envisaged act of the Joint Committee

During its sixth meeting, which will be held in 2023, or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee¹, the Joint Committee is to adopt a decision regarding the post-2021 amendment of Annex I and clarification in Annex IV to the Agreement ('the envisaged act').

The purpose of the envisaged act is to realign Annex I to updated legislation in both the European Union and the Swiss Confederation as well as to provide a clarification to Annex IV.

The envisaged act will become binding on the parties in accordance with Article 13(2) of the Agreement, which provides: 'The Joint Committee may decide to adopt a new Annex of to amend an existing Annex to this Agreement'. Furthermore, and in accordance with Article 12(3) of the Agreement, decisions taken by the Joint Committee in the cases provided for in this Agreement will, upon their entry into force, be binding on the Parties.

¹ Decision No 1/2019 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 of 25 January 2019 regarding the adoption of its Rules of Procedure, available from https://ec.europa.eu/clima/system/files/2021-07/20191201_jc_dec_rop_en.pdf and Council Decision (EU) 2018/1279 of 18 September 2018, OJ L 239 of 24.9.2018, p.8.

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 on the Decision of the Joint Committee to be taken on amending Annex I and providing clarification to Annex IV to the Agreement.

Amendments to Annex I to the Agreement are becoming necessary in view of the changes to the regulatory environment that evolved in both the European Union and Switzerland since the entry into force of the Agreement. In 2021, a new trading period started in both systems. On the Union side, the new trading period brought about a number of relevant changes to Directive 2003/87/EC², some of them are requiring clarification (essential criterion 5 of Part A, essential criterion 14 of Part B of Annex I) or are updating the relevant provisions including their legal references (essential criterion 10 of Part A and essential criteria 2, 9, 10, 13 of Part B of Annex I) in Part A of the column of the EU ETS of Annex I. Furthermore, and for the sake of clarity, it is appropriate to delete outdated text of the essential criteria in the EU column (essential criteria 8, 9, 12 and 13 of Part A and essential criterion 9, 10 and 12 of Part B) including the chapeau to Part A.

The applicability of the legal provisions from the start of the new trading period is reflected in both the column of the EU (essential criteria 10, 12 of Part A and essential criteria 2, 12 of Part B) and Switzerland (2, 3, 4, 5, 10, 11, 12, 13 of Part A and essential criteria 2, 4, 5, 6, 7, 8, 11, 12, 13, 14, 15 of Part B).

Finally, as for the Swiss column, clarification is provided (essential criteria 5, 10 of Part A and 7, 11, 14 of Part B) in addition to on how to maintain compatibility of the two systems with respect to a level playing field and distortion of competition (essential criteria 8, 9, 10 of Part A, essential criteria 9, 10 of Part B). Updating the legal references, partly in order to reflect annual updates of relevant Swiss legislation results in changes of essential criteria 4, 5, 10, 12 of Part A and 7, 8, 11, 15 of Part B to Annex I.

Amendments to the essential criteria of Part C of Annex I concerning “Essential Criteria for Registries” reflect the regulatory environment of the trading period that started on 1 January 2021, take account of different approaches applied in the two independent but linked registries or introduce wording that is more appropriate in the given context and aligned with relevant legislation.

Finally, in Annex IV, a footnote is introduced as a matter of clarification.

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. Following the entry into force of the Agreement on 1 January 2020, restoring compatibility and consistency including with actual and applicable legal provisions of the two Parties to the Agreement represents an important element for the proper and effective implementation and functioning of the Agreement.

² Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a system for greenhouse gas emission allowance trading within the Union and amending Council Directive 96/61/EC

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*’³.

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.

The act which the 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 Article 12(3) of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems.

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 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.

5. PUBLICATION OF THE ENVISAGED ACT

As the act of the Joint Committee will amend Annexes I and IV to the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas

³ 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.

emissions trading systems, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

Proposal for a

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(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 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 ('the Agreement')⁴ was signed on 23 November 2017 in accordance with Council Decision (EU) 2017/2240⁵.
- (2) The Agreement was concluded by Council Decision (EU) 2018/219⁶ and entered into force on 1 January 2020.
- (3) Pursuant to Article 12(3) of the Agreement, the Joint Committee may adopt decisions that are to, upon their entry into force, be binding on the Parties.
- (4) Article 13(2) of the Agreement provides that the Joint Committee may amend the Annexes to the Agreement.
- (5) It is appropriate to restore consistency with legal provisions applicable to the emission trading systems of the European Union and the Swiss Confederation following the start of the new trading period on 1 January 2021 and on clarifying Annex IV to the Agreement.
- (6) The Joint Committee, during its sixth meeting, or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee, is to adopt a Decision as regards the amendment of Annexes I and IV to the Agreement.
- (7) It is appropriate to establish the position to be taken on behalf of the Union, within the Joint Committee as regards the amendment of Annex I and IV to the Agreement, as the amended Annexes will be binding on the Union.

⁴ OJ L 322, 7.12.2017, p. 3.

⁵ Council Decision (EU) 2017/2240 of 10 November 2017 on the signing, on behalf of the Union, and provisional application of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (OJ L 322, 7.12.2017, p. 1).

⁶ Council Decision (EU) 2018/219 of 23 January 2018 on the conclusion of the Agreement between the European Union and the Swiss Confederation on the linking of their greenhouse gas emissions trading systems (OJ L 43, 16.2.2018, p. 1).

- (8) The position of the Union within the Joint Committee should therefore be based on the attached draft Decision,

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken, on behalf of the Union, during the sixth meeting of the Joint Committee, or earlier by means of the written procedure pursuant to Article 8(4) of the Rules of Procedure of the Joint Committee, shall be based on the draft Decision of the 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*