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2018/0337 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the second meeting of the Conference of the Parties to the Minamata Convention on Mercury with regard to the adoption of guidelines on the environmentally sound interim storage of mercury, other than waste mercury, referred to in its Article 10, paragraphs 2 and 3

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 second meeting of the Conference of the Parties to the Minamata Convention on Mercury in connection with the envisaged adoption of guidelines on the environmentally sound interim storage of mercury, other than waste mercury, referred to in Article 10, paragraphs 2 and 3 of that Convention.

2. CONTEXT OF THE PROPOSAL.

2.1. The Minamata Convention on Mercury

The Minamata Convention on Mercury ('the Agreement') 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 whole life-cycle of mercury, from primary mercury mining to mercury waste disposal, including the interim storage of mercury, mixtures of mercury with other substances, including alloys of mercury, with a mercury concentration of at least 95% per weight ('mercury mixtures'), and of six mercury compounds, including mercury (I) chloride, mercury (II) oxide, mercury (II) sulphate, mercury (II) nitrate, cinnabar and mercury sulphide, other than waste mercury.

The Agreement entered into force on 16 August 2017.

The European Union is a party to the Agreement¹ as well as most Member States².

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 adopted by the COP at its first meeting (24-29 September 2017), 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

On 19 November 2018, during its second meeting, the COP is to adopt guidelines regarding the environmentally sound interim storage of mercury, other than waste mercury, referred to in Article 10, paragraphs 2 and 3 of the Agreement ('the envisaged act').

¹ 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).

² On 7 September 2018, twenty-two Member States had ratified the Minamata Convention on Mercury, i.e. Austria, Belgium, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Sweden and the United Kingdom.

The purpose of the envisaged act is to establish guidelines aimed at ensuring the environmentally sound interim storage of mercury, mercury mixtures, and of six mercury compounds (mercury (I) chloride, (II) oxide, (II) sulphate, (II) nitrate, sulphide and cinnabar), other than waste mercury. In practice, the envisaged act is mainly relevant for the storage of liquid metallic mercury.

Under Article 10, paragraphs 2 and 3 of the Agreement, the measures Parties shall undertake to ensure environmentally sound interim storage must take into account the guidelines adopted by the COP.

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 second meeting of the COP, the adoption of the envisaged act.

The content of the envisaged act is the outcome of the intersessional process launched by the COP at its first meeting by means of Decision MC-1/18³, requesting “*the secretariat to undertake further revision of the draft guidelines*” and to “*submit the revised guidelines at its second meeting for consideration and possible adoption*”. Experts from the Union contributed significantly to this process by providing submissions to the Secretariat in accordance with the timetable set out in Decision MC-1/18. The resulting draft guidelines, as revised by that Secretariat, took on board comments received from EU experts and did not give rise to further EU comments as the guidelines are consistent with the *acquis*, including Directive 2012/18/EU of the European Parliament and of the Council of 4 July 2012 on the control of major-accident hazards involving dangerous substances⁴, concerning larger stocks of mercury. Furthermore, the guidelines include the recognition that they may be applied flexibly, in particular regarding small stocks.

The proposed position is consistent with EU policy and legislation on mercury as the implementation of the envisaged act by Parties to the Agreement would contribute to the reduction of mercury emissions and releases from interim storage, hence contributing to the protection of human health and of the environment, including within the Union.

A Union position is needed as, once adopted, the Parties to the Agreement shall have to take such guidelines into account when taking measures on the environmentally sound interim storage of mercury, mercury mixtures, and of the six concerned mercury compounds, other than waste mercury.

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.*’

³ Decision MC-1/18 *Draft guidelines on the interim storage of mercury and mercury compounds referred to in paragraph 3 of article 10*, Report of the Conference of the Parties to the Minamata Convention on Mercury on the work of its first meeting, UNEP/MC/COPI/29 of 22.11.2017.

⁴ OJ L197, 24.07.2012, p.1

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 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. The envisaged act has legal effects because Parties to the Agreement shall take it into account when undertaking measures to ensure the environmentally sound interim storage of mercury, mercury mixtures, and of six mercury compounds (mercury (I) chloride, (II) oxide, (II) sulphate, (II) nitrate, sulphide and cinnabar), other than waste mercury.

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 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.

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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 Mercury⁶ ('the Agreement') was concluded by the Union by Council Decision (EU) 2017/939⁷ 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 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 second meeting on 19-23 November 2018, is to adopt guidelines on the environmentally sound interim storage of mercury, other than waste mercury.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Conference of the Parties to the Agreement, as these guidelines on the environmentally sound interim storage of mercury, other than waste mercury, shall have legal effects since the Parties to the Agreement shall have to take such guidelines into account when undertaking measures on interim storage.
- (5) The Union contributed to the revision of the draft guidelines on environmentally sound interim storage in the framework of the intersessional expert work launched by Decision MC-1/18⁸ adopted by the Conference of the Parties to the Agreement at its first meeting; whereas the Union did not consider there was a need to propose further amendments to the draft revised guidelines resulting from this intersessional work.

⁶ 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>

⁷ 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).

⁸ Decision MC-1/18 *Draft guidelines on the interim storage of mercury and mercury compounds referred to in paragraph 3 of article 10*, Report of the Conference of the Parties to the Minamata Convention on Mercury on the work of its first meeting, UNEP/MC/COP1/29 of 22.11.2017.

- (6) The proposed guidelines on the environmentally sound interim storage of mercury, other than mercury waste, should therefore be supported.

HAS ADOPTED THIS DECISION:

Article 1

The position to be taken on the Union's behalf in the second meeting of the Conference of the Parties to the Agreement shall be the following:

The European Union shall support, at the second meeting of the Conference of the Parties to the Agreement, the adoption of guidelines on the environmentally sound interim storage of mercury, other than waste mercury, referred to in Article 10, paragraphs 2 and 3 of the Agreement.

Minor changes to the documents referred to in the first sub-paragraph may be agreed to by the representatives of the Union without further decision of the Council.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President