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Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union in the seventh Meeting of the Parties of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds with regard to certain amendments to Annex 3 to the Agreement

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 seventh meeting of the Parties of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds (AEWA) in connection with the envisaged adoption of certain amendments to its Annex 3.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on the Conservation of African-Eurasian Migratory Waterbirds

The Agreement on the Conservation of African-Eurasian Migratory Waterbirds ('the Agreement') aims to conserve migratory waterbirds and their habitats across Africa, Europe, the Middle East, Central Asia, Greenland and the Canadian Archipelago. The Agreement entered into force on 1 November 1999.

Developed under the framework of the Convention on Migratory Species (CMS) and administered by the United Nations Environment Programme (UNEP), AEWA brings together countries and the wider international conservation community in an effort to establish coordinated conservation and management of migratory waterbirds throughout their entire migratory range.

The European Union is a Contracting Party to this Agreement since 1 October 2005¹. At present, there are seventy-seven Contracting Parties, forty-one from Eurasia (including the EU) and thirty-six from Africa.

Twenty-five Member States are parties to the Agreement².

Directive 2009/147/EC on the conservation of wild birds (Birds Directive)³ implements in Union law the commitments set out in the Agreement. The Birds Directive relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation.

2.2. The Meeting of the Parties

The Meeting of the Parties (MOP) is the principal decision-making body for the Agreement. It has powers to review the Annexes to the Agreement and it meets every three years. Each Party has one vote, but regional economic integration organizations, like the European Union, exercise their right to vote with a number of votes equal to the number of their Member States which are Parties to the Agreement. Any amendment to an Annex shall be adopted by a two-thirds majority of the Parties present at the meeting.

The seventh Meeting of the Parties of the Agreement will take place on 4-8 December 2018, in South-Africa.

¹ Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds. OJ L 345, 8.12.2006, p. 24.

² Three Member States are not Parties to the Agreement: Austria, Malta, and Poland.

³ OJ L 20 of 26.01.2010. p. 7 - <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:020:0007:0025:EN:PDF>.

2.3. The envisaged act of the Meeting of the Parties

On 4-8 December 2018, during its seventh meeting, the Meeting of the Parties is to adopt the Resolution 7.3⁴ regarding amendments to the Annexes to the Agreement in accordance with Article X, paragraph 5, of the Agreement ('the envisaged act').

The purpose of the envisaged act is to amend Annex 2 and Annex 3 (Action Plan) to the Agreement. Annex 2 comprises the list of migratory waterbirds to which the Agreement applies. Annex 3 specifies actions which the Parties shall undertake in relation to priority species. The priority species are listed in Table 1 of Annex 3 according to certain criteria set out in Table 1.

Article II of the Agreement provides: '*Parties shall take co-ordinated measures to maintain migratory waterbird species in a favourable conservation status or to restore them to such a status. To this end, they shall apply within the limits of their national jurisdiction the measures prescribed in Article III, together with the specific actions determined in the Action Plan provided for in Article IV, of this Agreement*'.

The envisaged act will enter into force for all Parties and become binding on them on the ninetieth day after the date of its adoption by the Meeting of the Parties, except for Parties that have entered a reservation. During the ninety-day period, any Party may, by written notification to the Depositary, enter a reservation with respect to an amendment to an Annex.

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

The proposed position to be taken on the European Union's behalf is to support, at the seventh Meeting of the Parties, the envisaged act.

The proposed amendments to Annex 2 were submitted by the European Union. The proposed amendments to Annex 3 were proposed by the European Union and Uganda.

The proposed amendments to Annexes 2 and 3 by the European Union were submitted further to Council decision 10326/18⁵.

The proposed amendment to Annex 2 by the European Union consists in adding the Shag (*Phalacrocorax aristotelis*) to the list of waterbird species to which the Agreement applies.

The proposed amendments to Table 1 of Annex 3 by the European Union consist in moving all populations of the Curlew Sandpiper (*Calidris ferruginea*), Atlantic Puffin (*Fratercula arctica*), and Razorbill (*Alca torda*) to Column A of Table 1, in categories 4, 1b, and 4, respectively, and in listing the non-European Union (Barents Sea) population of *Phalacrocorax aristotelis aristotelis* and the European Union population (East Mediterranean – Croatia, Adriatic Sea) of *Phalacrocorax aristotelis desmarestii* in Column A of Table 1 of Annex 3, in categories 2 and 1c, respectively.

These proposed amendments will be approved on behalf of the European Union by the Commission, in line with Article 3(1) and 3(3) of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

The proposed amendments to Table 1 of Annex 3 by Uganda consist in removing the word "significant" from criteria A3(c) and B2(c), creating a new criterion A3(e) and B2(e) for

⁴ <https://www.unep-aewa.org/en/document/adoption-amendments-aewa-annexes-3>

⁵ <http://data.consilium.europa.eu/doc/document/ST-10326-2018-INIT/en/pdf> (but does not work anymore)

“*rapid short-term decline*”, and moving several species from one column or category to the other as set out in the draft Resolution 7.3.

Those amendments proposed by Uganda should be approved on behalf of the European Union, since they reflect the evolution of the conservation status of the concerned bird species populations and will contribute to a higher degree of protection of the species populations that are in decline. In particular,

- (a) The proposed amendments to Annex 3 to the Agreement submitted by Uganda and set out in the draft Resolution 7.3 that are in line with the relevant EU legislation (Birds Directive) shall be approved on behalf of the European Union by the Commission, in line with Article 3(1) and 3(3) of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.
- (b) The proposed amendments to Annex 3 to the Agreement submitted by Uganda and set out in the draft Resolution 7.3 concerning the following nine species: Common Eider - *Somateria mollissima*, Red-breasted Merganser - *Mergus serrator*, Common Pochard - *Aythya ferina*, Eurasian Oystercatcher - *Haematopus ostralegus*, Northern Lapwing - *Vanellus vanellus*, Bar-tailed Godwit - *Limosa lapponica*, Black-tailed Godwit - *Limosa limosa*, Red Knot - *Calidris canutus*, and Spotted Redshank - *Tringa erythropus*, which are not in line with the relevant EU legislation (Birds Directive), shall be approved on behalf of the European Union pursuant to article 218.9 TFUE.

However, in line with Article 3(4) of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, the Commission shall enter a reservation with regard to the proposed amendments concerning the above nine species, as it did for amendments with similar effects at the previous Meetings of the Parties, since they would require an amendment to the Birds Directive, which is not possible within ninety days of the date of their adoption by the Meeting of the Parties.

In the European Union reservation two groups of species are to be distinguished.

For the populations of four species – the Red-breasted Merganser, Common Pochard, Black-tailed Godwit, and Spotted Redshank, that are proposed to be listed in Categories 1b (Common Pochard) or 3c (the other three species) of Column A, no more hunting would be allowed under the Agreement although they are huntable species under the Birds Directive since they are listed in Annex IIb thereof. Therefore, in line with Article 3(4) of Council decision 2006/871/EC of 18 July 2005, the Commission shall enter a reservation with respect to those amendments, since it is not possible to amend the Birds Directive within ninety days of the date of their adoption by the Meeting of the Parties.

The populations of the five other species - the Common Eider, Eurasian Oystercatcher, Northern Lapwing, Bar-tailed Godwit, and Red Knot - are proposed to be listed in Category 4 of Column A of Annex 3 of the Agreement. According to Annex 3, the species listed in that Category may only be hunted within the framework of an international species action plan, through which Parties will endeavour to implement the principles of adaptive harvest management. Therefore, the European Union reservation with regard to them could be lifted once an adaptive harvest management mechanism under an international body, consistent with the requirements of Article 7 of the Birds Directive, is in place.

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*’⁶.

4.1.2. Application to the present case

The Meeting of the Parties is a body set up by an agreement, namely the Agreement on the Conservation of African-Eurasian Migratory Waterbirds.

The act which the Meeting of the Parties is called upon to adopt constitutes an act having legal effects. The envisaged act will be binding under international law and is capable of decisively influencing the content of European Union legislation, namely, the Birds Directive. This is because some actions, in particular as regards hunting, which the Parties shall undertake in relation to priority species listed in Table 1 of Annex 3 of the Agreement are not always compatible with what the Birds Directive provides for the same species. Namely, if a species listed in Annex II of the Birds Directive becomes no more huntable under AEWA, an amendment of the Birds Directive would be required. Under Article 3 of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, as regards matters falling within Community competence, the Commission is authorised to approve, on behalf of the Community, amendments to the Annexes to the Agreement adopted in accordance with Article X(5) of the Agreement. However, this authorization is limited to those amendments that are consistent with, and do not entail any modification of, Community legislation on the conservation of wild birds and their natural habitats.

Since the proposed amendments of Uganda to Table 1 of Annex 3 of the Agreement concerning the following nine species: Common Eider - *Somateria mollissima*, Red-breasted Merganser - *Mergus serrator*, Common Pochard - *Aythya ferina*, Eurasian Oystercatcher - *Haematopus ostralegus*, Northern Lapwing - *Vanellus vanellus*, Bar-tailed Godwit - *Limosa lapponica*, Black-tailed Godwit - *Limosa limosa*, Red Knot - *Calidris canutus*, and Spotted Redshank - *Tringa erythropus* would require an amendment to the Birds Directive, a Council decision is needed to establish the position to be taken on behalf of the European Union in the seventh Meeting of the Parties of the Agreement in that respect⁷.

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.

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.

⁷ For amendments that would not require an amendment to the Birds Directive, the Commission may approve them in accordance with Council decision 2006/871/EC of 18 July 2005.

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 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 envisaged act of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds will amend its Annexes 2 and 3, it is appropriate to publish it in the *Official Journal of the European Union* after its adoption.

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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 Agreement on the Conservation of African-Eurasian Migratory Waterbirds ('the Agreement') entered into force on 1 November 1999 and was approved on behalf of the European Community by Council Decision 2006/871/EC⁸
- (2) Pursuant to Article X, paragraph 5, of the Agreement, the Meeting of the Parties may adopt amendments to Annexes of the Agreement.
- (3) The seventh Meeting of the Parties of the Agreement, on 4-8 December 2018, is expected to adopt a Resolution on the adoption of amendments to the Annexes 2 and 3 of the Agreement.
- (4) It is appropriate to establish the position to be taken on the Union's behalf in the Meeting of the Parties, as the Resolution will be binding on the Union and capable of decisively influencing the content of Union law, namely the Birds Directive.
- (5) The proposed amendments to Annex 3 to the Agreement submitted by Uganda and set out in the draft Resolution 7.3 concerning the following nine species: Common Eider - *Somateria mollissima*, Red-breasted Merganser - *Mergus serrator*, Common Pochard - *Aythya ferina*, Eurasian Oystercatcher - *Haematopus ostralegus*, Northern Lapwing - *Vanellus vanellus*, Bar-tailed Godwit - *Limosa lapponica*, Black-tailed Godwit - *Limosa limosa*, Red Knot - *Calidris canutus*, and Spotted Redshank - *Tringa erythropus*, which are not in line with the relevant EU legislation (Birds Directive), should be approved on behalf of the European Union, since they contribute to achieving a higher degree of protection of these species populations that are in decline. However, in line with Article 3(4) of Council Decision 2006/871/EC of 18 July 2005 on the conclusion on behalf of the European Community of the Agreement on the Conservation of African-Eurasian Migratory Waterbirds, the Commission shall enter a reservation with regard to the proposed amendments concerning the above nine species, since they would require an amendment to the Birds Directive, which is not possible within ninety days of the date of their adoption by the Meeting of the Parties.

⁸ OJ L345, 8.12.2006, p. 24

HAS ADOPTED THIS DECISION:

Article 1

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

The amendments to Annex 3 to the Agreement submitted by Uganda and set out in the draft Resolution 7.3 of the Seventh Meeting of the Parties to the Agreement concerning the following nine species: Common Eider - *Somateria mollissima*, Red-breasted Merganser - *Mergus serrator*, Common Pochard - *Aythya ferina*, Eurasian Oystercatcher - *Haematopus ostralegus*, Northern Lapwing - *Vanellus vanellus*, Bar-tailed Godwit - *Limosa lapponica*, Black-tailed Godwit - *Limosa limosa*, Red Knot - *Calidris canutus*, and Spotted Redshank - *Tringa erythropus* will be approved at the Seventh Meeting of the Parties on behalf of the European Union.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*