



Council of the
European Union

Brussels, 24 January 2019
(OR. en)

5679/19

**Interinstitutional File:
2019/0008(NLE)**

**ENV 73
MAR 14
COMER 12**

PROPOSAL

From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	23 January 2019
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2019) 11 final
Subject:	Proposal for a COUNCIL DECISION on the position to be taken on behalf of the European Union at the 14 th 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 Annexes II, VIII and IX thereto

Delegations will find attached document COM(2019) 11 final.

Encl.: COM(2019) 11 final



Brussels, 23.1.2019
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2019/0008 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 14th 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 Annexes II, VIII and IX thereto

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns a decision establishing the Union's position at the 14th meeting of the Conference of the Parties to the Basel Convention, in connection with the envisaged adoption of amendments of the Annexes to the Convention.

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 Convention¹. The Convention now binds 186 Parties.

The Convention's cornerstone is a control system for the export, import and transit of certain waste. Exports of waste subject to the Convention shall be notified in advance to the competent authorities of the States of import and transit. The notification shall be made by the exporting State which can also require generators or exporters to make such notifications through the channel of its competent authority. The notifications shall be made in writing containing 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 and other waste listed in Annex II which contains waste collected from households and residues arising from the incineration of household 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 14th meeting of the Conference of the Parties (CoP14) will take place in April to May 2019, in Geneva.

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 envisaged act

One of the items on the provisional agenda of the 14th meeting of the Conference of the Parties concerns a proposal submitted by Norway to amend certain Annexes to the Convention ('the envisaged act')².

This envisaged act does not amount to place all plastic waste under the control mechanisms of the Basel Convention, but to include some plastic waste under such control mechanisms, while leaving other plastic waste outside these controls (so that they can continue to be traded without notifications by exporting/importing countries).

The purpose of the envisaged act is to modify or add entries concerning plastic waste in:

- Annex II for non-hazardous plastic waste which should be subject to the Convention's control system,
- Annex VIII for hazardous plastic waste which should also be subject to the control system, and
- Annex IX for non-hazardous plastic waste which should not be subject to the 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.

The proposal to amend Annexes II, VIII and IX of the Convention, submitted by Norway, was distributed to the Parties on 26 October 2018. With the proposal, non-hazardous plastic waste falling within a revised entry in Annex IX can continue to be traded between countries on the same conditions under the Convention as today, while plastic waste requiring special consideration and hazardous plastic waste, in new entries in Annexes II and VIII respectively, fall under the Convention's control system.

The modifications of Annexes II, VIII and IX to the Convention will come into effect in the EU after they have been implemented through amendments of Regulation (EC) No 1013/2006 of the European Parliament and of the Council of 14 June 2006 on shipments of waste³. The changes for operators and authorities as regards exports from the EU will depend on the types of waste and the countries of destination.

Exports from the EU to non-OECD countries of a number of new categories of hazardous plastic waste (listed in Annex VIII) will be prohibited. Exports within the OECD of such waste will have to follow the notification procedure. Exports from the EU to non-OECD countries of certain non-hazardous plastic waste included in Annex II will also be prohibited, unless the EU decides to apply the notification procedure through amendments to Regulation (EC) No 1013/2006 (which is subject to review by the end-of-2020). Exports within the OECD of such waste will also be subject to the notification procedure. Finally, the types of non-hazardous plastic waste falling under Annex IX to the Convention could be exported without any

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.

controls, provided that some conditions are met, ensuring that they are easy to recycle in the importing country.

The automatic implementation of the Norwegian proposal into Regulation (EC) No 1013/2006 would result in subjecting **intra-EU shipments** of wastes newly included in Annexes II or VIII of the Basel Convention to the notification procedure.

The procedure for amending annexes of the Convention is governed by Articles 17 and 18 of the Convention. More particularly, any proposed amendment must be made by a Party and communicated by the Secretariat to all Parties at least six months before the meeting at which it is proposed for adoption, i.e. by 28 October 2018 for CoP14. In addition, any such amendment must be adopted at a meeting of the Conference of the Parties and may become effective six months from the date of issuance of a notification by the Depository. The envisaged act will become binding on the Parties in accordance with Article 18(2)(c) of the Convention, which provides: “On the expiry of six months from the date of the circulation of the communication by the Depository, the annex shall become effective for all Parties to this Convention or to any protocol concerned, which have not submitted a notification in accordance with the provision of subparagraph (b) above”.

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

The Union should support amendments of the annexes to the Convention to modify or add entries concerning plastic waste in:

- Annex II for non-hazardous plastic waste which should be subject to the Convention's control system,
- Annex VIII for hazardous plastic waste which should also be subject to the control system, and
- Annex IX for non-hazardous plastic waste which should not be subject to the 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.

Without the above amendments of the annexes to the Convention, there are significant risks that plastic waste will be exported to countries lacking adequate infrastructures for effective collection and environmentally sound management of waste. The envisaged act will contribute to:

- improving controls on plastic waste exports,
- supporting the environmentally sound management of plastic waste,
- reducing risks that plastic waste finds its way into the environment, and
- preventing the global environmental problem of marine litter.

The European Plastics Strategy adopted on 16 January 2018⁴ states that international action is key to tackling the most significant sources of plastics litter in the oceans, i.e. insufficient waste management infrastructure in developing countries and emerging economies. The Plastics Strategy specifically mentions supporting action under the Basel Convention and ensuring that any plastics sent abroad for recycling are handled and processed under conditions similar to those applicable in the EU. The EU exports a significant share of its plastic waste to third countries (3 million tons in 2016) where uncertainty remains over its treatment and cross-border problems are increasing in light of international developments, including China's recent decision to restrict imports of certain types of plastic waste.

The provisions of the Convention are implemented in the Union through Regulation (EC) No 1013/2006. This Regulation applies to exports from and imports to the Union as well as shipments between Member States (Article 1). The regulation also applies within the European Economic Area (the 'EEA').⁵

When the envisaged act has been adopted and become effective it would need to be implemented into Union law and more specifically in Regulation (EC) No 1013/2006. This would mean subjecting shipments within the EU and the EEA of plastic waste newly included in Annex II and VIII to new control measures (and a ban on export to non-OECD countries for these wastes). While this situation would be desirable for the above reasons as regards exports from the EU, this could have undesired and problematic effects on intra-EU and intra-EEA shipments of plastic waste destined for recycling, as it would subject them to new notification procedures. These shipments are already subject to environmental protection requirements in Union legislation on waste and the introduction of new administrative procedures could make plastic recycling in the EU more complicated and costly while bringing only limited benefits from an environment perspective.

In order to maintain the current situation within the Union and the EEA, i.e. without the control system of the Convention for shipments of new plastic wastes, it would be necessary to notify the provisions concerned to the Secretariat of the Convention under Article 11 of the Convention. This Article allows Parties to enter into bilateral, multilateral, or regional agreements or arrangements regarding transboundary waste movements provided that the agreements or arrangements are compatible with the environmentally sound management of waste as required by the Convention. The agreements or arrangements shall stipulate provisions which are not less environmentally sound than those provided for by the Convention in particular taking into account the interests of developing countries. Notifications under Article 11 have been made for example concerning an OECD Council Decision⁶.

Consequently, this proposal for a Council decision envisages that the Union will notify the provisions applied to shipments of the plastic waste concerned within the Union and the EEA, in so far as these provisions differ from the envisaged act, and specifying that our provisions are based on a system of environmentally sound management compatible with the Convention, to the Secretariat in accordance with Article 11 of the Convention. Steps will

⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'A European Strategy for Plastics in a Circular Economy, COM(2018)(28) final

⁵ Decision of the EEA Joint Committee No 73/2008 of 6 June 2008

⁶ C(2001)107/Final on the Control of Transboundary Movements of Wastes Destined for Recovery Operations, <http://www.basel.int/Countries/Agreements/tabid/1482/Default.aspx>

also need to be taken to inform the OECD secretariat of the above situation because of links between amendments of the annexes to the Convention and the above OECD decision.

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’*⁷.

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 decisively 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 Regulation also applies within the EEA.

When the Annexes to the Convention have been amended, these amendments would need to be implemented in Regulation (EC) No 1013/2006 (with the possible exception of provisions on intra-EU shipments of waste, as explained above).

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

⁷ 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.

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), in conjunction with Article 218(9) TFEU.

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at the 14th 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 Annexes II, VIII and IX thereto

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') was concluded 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 disposal⁸ and entered into force in 1992.
- (2) Pursuant to Article 15 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 14th meeting in April to May 2019, is to consider the adoption of amendments of the Annexes to the Convention to modify or add entries concerning plastic waste in:
 - Annex II for non-hazardous plastic waste which should be subject to the Convention's control system,
 - Annex VIII for hazardous plastic waste which should also be subject to the control system, and
 - Annex IX for non-hazardous plastic waste which should not be subject to the 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.
- (4) A proposal to amend Annexes II, VIII and IX of the Convention, submitted by Norway, was distributed to Parties on 26 October 2018. With the proposal, non-hazardous plastic waste falling within a revised entry in Annex IX will continue to be

⁸ OJ L 39, 16.2.1993, p. 1.

traded between countries on the same conditions under the Convention as today, while plastic waste requiring special consideration and hazardous plastic waste, in new entries in Annexes II and VIII respectively, would fall under the Convention's control system.

- (5) It is appropriate to establish the position to be taken on the Union's behalf at the Conference of the Parties, as the envisaged act will be binding on the Union and capable of decisively influencing 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 waste⁹.
- (6) The Union should support the above amendments of the Annexes to the Convention since they will contribute to improving controls on plastic waste exports, preventing exports of plastic waste to countries lacking adequate infrastructures for effective collection and environmentally sound management of waste, supporting the environmentally sound management of plastic waste, reducing risks that plastic waste finds its way into the environment, and preventing the global environmental problem of marine litter.
- (7) It is appropriate to maintain the current situation for shipments of plastic waste within the Union and the EEA, and therefore not use the control system of the Basel Convention for wastes, which could be included in Annex II and Annex VIII at the 14th Conference of the Parties to the Basel Convention. The Union should therefore notify provisions of Union legislation applied to shipments of the plastic waste concerned within the Union and the EEA, in so far as these provisions differ from the envisaged act, and specifying that our provisions are based on a system of environmentally sound management compatible with the Convention. This notification shall be made to the Secretariat of the Convention in accordance with Article 11 of the Convention.

HAS ADOPTED THIS DECISION:

Article 1

1. The position to be taken on the Union's behalf at the 14th meeting of the Conference of the Parties to the Basel Convention shall be the following, subject to paragraph 2:

The Union supports amendments of the Annexes to the Convention to modify or add entries concerning plastic waste in:

- Annex II for non-hazardous plastic waste which should be subject to the Convention's control system,
- Annex VIII for hazardous plastic waste which should also be subject to the control system, and

⁹ OJ L 190, 12.7.2006, p. 1.

- Annex IX for non-hazardous plastic waste which should not be subject to the 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. When the envisaged act has been adopted by the Conference of the Parties to the Basel Convention, the Union will notify to the Secretariat of the Convention, in accordance with Article 11 of the Convention, provisions of Union legislation applied to shipments of the plastic waste covered by the envisaged act within the Union and the EEA, in so far as these provisions differ from the envisaged act.

Article 2

This Decision is addressed to the Commission.

Done at Brussels,

*For the Council
The President*