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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 19.12.2007
COM(2007) 821 final

Proposal for a

COUNCIL DECISION

establishing the position to be adopted on behalf of the European Community with regard to proposals for amendments to the Schedule of the International Convention on the Regulation of Whaling

(presented by the Commission)

EXPLANATORY MEMORANDUM

- (1) According to Article 174.1 of the EC Treaty, one of the objectives of Community environment policy is the promotion of measures at international level to deal with regional or worldwide environmental problems. This objective encompasses the conservation of species at global level, including whales. The European Community is committed to the conservation of whales and other cetaceans and has put in place environmental legislation that ensures a high level of protection in this regard.
- (2) The Habitats Directive¹ lists all cetacean species in its Annex IV. This means that all whale species are strictly protected from deliberate disturbance, capture or killing within Community waters. The same Directive also prohibits the keeping, transport and sale or exchange, of specimens taken from the wild. This legislation does not allow the resumption of commercial whaling on any stock totally or partially occurring in Community waters. Due to the migratory character of whale stocks, it is clear that the objectives of the Habitats Directive can only be achieved in full if a comparable international regulatory framework is in place.
- (3) Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein,² implementing the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in the EC, bans the introduction of cetaceans into the Community for primarily commercial purposes.³ This high level of protection is further reinforced by the EC Marine Strategy⁴ and the proposed Marine Directive⁵ that is expected to strengthen whales' protection in the EC by fostering the overall objective of good environmental status of the EU oceans and seas.
- (4) Therefore, the ultimate objective of Community environmental policy in relation to whales is to seek their strictest protection. The above mentioned environmental legislation ensures a highest level of protection through extensive rules harmonisation.
- (5) Furthermore, under the Common Fisheries Policy (CFP), the Community has exclusive competence for the conservation of biological resources of the sea⁶. In addition, cetaceans fall within the scope of Annex I to the EC Treaty and are subject to Articles 33 to 38 thereof⁷. Moreover, Council Regulation (EC)

¹ Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

² OJ L 61, 3.3.1997, p. 1.

³ In addition, Council Regulation (EEC) 348/81 on common rules for imports of whales and other cetacean products only allows imports of listed products if they are not used for commercial purposes.

⁴ Communication from the Commission to the Council and the European Parliament: Thematic strategy on the protection and conservation of the Marine Environment COM(2005) 504 final.

⁵ Proposal for a Directive of the European Parliament and of the Council establishing a Framework for Community Action in the field of Marine Environmental Policy COM(2005) 505 final.

⁶ See for instance Cases C-141/78 [1979] ECR 2923, paragraph 6, and C-804/79, [1981] ECR 1045, paragraph 17.

⁷ See Art. 32, paragraph 3 of the EC Treaty

2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy⁸ states that the scope of the CFP extends to conservation, management and exploitation of living aquatic resources. On this basis, the Community has concluded fisheries agreements dealing, partly or exclusively, with marine mammals⁹. Similarly, cetaceans are addressed by secondary legislation adopted under the CFP, aimed to implement international commitments undertaken in the context of fisheries agreements and to address the protection of whales in the high seas¹⁰.

- (6) EC policy on whales will not be effective within Community waters if it is not backed by coherent worldwide action. . In the context of the integrated maritime policy for the EU, the Commission will work for the coordination of European interests' on international issues.
- (7) The International Whaling Commission (IWC) is the competent international organisation regarding the conservation and management of whale stocks at global level and it was set up under the International Convention for the Regulation of Whaling ('the Convention') signed in 1946. The purpose of the Convention is to "provide for the effective conservation and management of whale stocks, and thus make possible the orderly development of the whaling industry" (preamble of the Convention). Membership of the IWC is only open to governments that adhere to the Convention. An amendment to the Convention allowing the EC to become a member would require the ratification of a protocol by all IWC members. The Commission adopted a proposal in 1992¹¹ to negotiate the accession of the Community to the Convention but the Council has not given any follow up to this proposal. However, the Community has observer status thereto.
- (8) Commercial whaling was suspended in 1986 as a result of a moratorium agreed by the majority of countries represented in the IWC. Uncertainties in the scientific analyses concerning the status of various whale stocks were the main reasons for this pause in commercial whaling. Ever since, the main issue regularly discussed at IWC meetings is whether whale stocks have recovered enough to lift the ban on commercial whaling in a controlled fashion.
- (9) The dual mandate of the IWC of both managing whaling and conserving whales has led to extremely polarised positions over the years between leading 'pro- whaling' States and 'anti-whaling' ones. Leading pro-whaling States (e.g. Japan, Iceland and Norway) have consistently contested the

⁸ OJ L 358, 31.12.2002, p.59.

⁹ See e.g. Council Decision 2005/938/EC on the approval on behalf of the European Community of the Agreement on the International Dolphin Conservation Programme, OJ L 348, 30.12.2005, p. 26.

¹⁰ See e.g. Council Regulation (EC) 973/2001 laying down certain technical measures for the conservation of certain stocks of highly migratory species, OJ L 137, 19.5.2001, p. 1; Council Regulation (EC)1936/2001 laying down control measures applicable to fishing for certain stocks of highly migratory fish, OJ L 263, 3.10.2001, p. 1; Regulation 1967/2006 concerning management measures for the sustainable exploitation of fishery resources in the Mediterranean Sea, OJ L 36, 8.2.2007, p. 6.

¹¹ Draft Council Decision authorizing the Commission to negotiate, on behalf of the Community, a protocol amending the international Convention on the regulation of whaling, Washington, 2 December 1946 COM (92)316.

moratorium and still carry out whaling for what they call scientific purposes or other exceptions.

- (10) The general ban on commercial whaling decided within the IWC is in line with EC policies, as defined by the above-mentioned legislation. It is important that the IWC ensures the continuation of the moratorium on the basis of the currently available scientific information. However, in virtually all IWC meetings since the entry into force of the ban, Japan has proposed amendments to the 'Schedule' to the Convention to authorise whaling under certain conditions and *de facto* lift the ban for certain stocks. Therefore, the 20 EU Member States that are IWC members¹² have to express at each IWC meeting their position on such proposals which fall within Community competence. It is anticipated that this will happen again at 60th IWC Annual meeting in 2008 in Santiago (Chile) and at subsequent meetings.
- (11) In accordance with the principle of loyal cooperation reflected in Article 10 of the EC Treaty and with the principle of the unity in the external representation of the Community, it is essential that Member States prepare the next meetings of the IWC by reaching a common position in the Council. Such position, due to the limitations intrinsic to the observer status of the Community should be expressed by the Member States acting jointly in the interest of the Community within the IWC. It is also essential that the remaining 7 Member States that are not yet Parties to the IWC accelerate their accession procedure. Only acting together and developing a Community position the EU Member States would stand a chance to ensure the development and enforcement of an adequate and strict international regulatory framework for the protection of whales.
- (12) To this end, the Commission is proposing a decision to the Council with three legal bases: Articles 37 (fisheries policy) and 175 (environment policy) and Article 300 (2) (2) for the purpose of establishing the position to be adopted on behalf of the Community in a body set up by an agreement when that body will adopt decisions with legal effects.
- (13) The proposed Council decision has a **twofold component** as the expected proposals for amendments to the Convention would fall within both environment and fisheries policy as neither of them can be identifiable as the main or predominant purpose, the other being merely incidental, secondary or indirect.
- (14) Moreover, IWC decisions to amend the Schedule to the Convention **have legal effects** as they become effective within a prescribed period without the need for ratification¹³. It is not possible for the Community to initiate and complete its internal procedures to establish its position only after other IWC Members have tabled amendment proposals as these can come until 60 days before the next IWC meeting. In addition, as the proposed objective of the

¹² Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Sweden, UK.

¹³ See Article V of the Convention. Under paragraph 3, Parties become bound by amendments to the Schedule within ninety days unless they present an objection.

Community is to oppose initiatives to lift the moratorium on commercial whaling, the Council can already establish the Community position for the 60th meeting of the IWC in 2008 and for future IWC meetings.

- (15) Furthermore, the Community should also support amendments to the Schedule aimed at setting up whale sanctuaries and oppose proposals to amend the rules of procedure of the IWC to broaden the scope of secret ballots, as this would be contrary to the objectives of the Aarhus Convention, to which the Community and its Member States are Parties, and particularly its Article 3(7).

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 37 and 175(1), in conjunction with the second subparagraph of Article 300(2) thereof,

Having regard to the proposal from the Commission¹⁴,

Whereas:

- (1) Article 174.1 of the EC Treaty states that one of the objectives of Community environment policy is the promotion of measures at international level to deal with regional or worldwide environmental problems.
- (2) According to Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)¹⁵ all cetacean species are listed in its Annex IV. Therefore, all whale species are strictly protected from deliberate disturbance, capture or killing within Community waters. The same Directive also prohibits the keeping, transport and sale or exchange, of specimens taken from the wild.
- (3) Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein,¹⁶ implementing the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in the EC, bans the introduction of cetaceans into the Community for primarily commercial purposes¹⁷.
- (4) Under the Common Fisheries Policy (CFP), the Community has exclusive competence for the conservation of biological resources of the sea¹⁸.
- (5) EC policy on whales will not be effective within Community waters if it is not backed by coherent worldwide action.

¹⁴ OJ C , , p. .

¹⁵ OJ L 206, 22.7.1992, p. 7.

¹⁶ OJ L 61, 3.3.1997, p. 1.

¹⁷ In addition, Council Regulation (EEC) 348/81 on common rules for imports of whales and other cetacean products only allows imports of listed products if they are not used for commercial purposes.

¹⁸ See for instance Cases C-141/78 [1979] ECR 2923, paragraph 6, and C-804/79, [1981] ECR 1045, paragraph 17.

- (6) The International Whaling Commission (IWC) is the competent international organisation regarding the conservation and management of whale stocks at global level and was set up under the International Convention for the Regulation of Whaling (the Convention) signed in 1946. The purpose of the Convention is to "provide for the effective conservation and management of whale stocks and thus make possible the orderly development of the whaling industry". Membership of the IWC is only open to governments.²⁰ Member States of the European Union are parties to the IWC¹⁹. The European Community has only observer status at the IWC and it is represented by the Commission.
- (7) Commercial whaling was suspended in 1986 as a result of a moratorium agreed by the majority of countries represented in the IWC. Leading pro-whaling States have consistently contested the moratorium and still carry out whaling for what they call scientific purposes or under other exceptions.
- (8) The IWC works on the basis of a Schedule that governs the conduct of whaling throughout the world. The Schedule is annexed to the Convention and is defined as an integral part of it. It is binding on Parties and provides detailed whaling regulations with respect to the conservation and utilization of whale resources.
- (9) Proposals for decisions to amend the Schedule adopted within the IWC may have legal effects and affect the achievement of the objectives of Community policies and legislation in relation to cetaceans. Some of the proposals regularly put forward for decision at each meeting of the IWC aim at authorising whaling activities, through the establishment of quotas and the application of management measures, or at the setting up of whale sanctuaries, and require the establishment of a Community position.
- (10) Member States have a duty of loyal cooperation under Article 10 of the EC Treaty and cannot take on obligations outside the framework of Community legislation which might affect Community rules or alter their scope.
- (11) The Community being an observer, the Community position should be decided by the Council and expressed by the Member States acting jointly in the interest of the Community.
- (12) At the 60th meeting of the IWC in 2008 and at future IWC meetings, the Community and the Member States should cooperate closely to ensure that any amendments to the Convention and its Schedule are consistent with the objectives of Community policies and legislation on whales.

HAS DECIDED AS FOLLOWS:

Article 1

The position of the Community at the 60th meeting of the IWC in 2008 and at future IWC meetings shall be in accordance with the Annex to this Decision and shall be expressed by the Member States acting jointly in the interest of the Community.

¹⁹ Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Sweden, UK.

Article 2

Where the position referred to in Article 1 is likely to be affected by new scientific or technical information presented before or during the meetings of the IWC or where proposals are made on the spot on matters which are not yet the subject of a Community position, a position shall be established on the proposal concerned through co-ordination, including on the spot, before the proposal is put to a vote.

Done at

For the Council
The President

ANNEX

- (1) The overarching objective of the European Community in relation to the IWC is to ensure an effective international regulatory framework for the protection of whales.
- (2) Subject to any future review having regard to relevant developments, the Member States acting jointly in the interest of the Community shall take the following position on proposals for decisions by the IWC:
 - (a) Oppose any proposal to amend the Schedule having the effect of a total or partial lifting of the moratorium on commercial whaling;
 - (b) Support proposals to amend the Schedule for the creation of whale sanctuaries;
 - (c) Support proposals for the continuation of aboriginal subsistence whaling, on the condition that the conservation of the relevant stocks is not compromised, having due regard to the principle of precaution and to the advice by the Scientific Committee;
 - (d) Support proposals aimed to address comprehensively all whaling activities carried out under the different legal headings of the Convention, including scientific whaling.
 - (e) Support proposals which are coherent with the Community position adopted in relation to the Convention on International Trade on Endangered Species (CITES) and other international agreements to which the EC is a Party;
 - (f) Support proposals to continue the activities of the Conservation Committee and proposals to address the conservation concerns on small cetaceans;
 - (g) Support proposals to encourage collection of scientific data using non destructive methods and research on conservation of whale populations;
 - (h) Oppose any proposals to amend the rules of procedure of the IWC to broaden the scope of secret ballot.