



EUROPEAN COMMISSION

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Proposal for a

COUNCIL DECISION

establishing the position to be adopted on behalf of the European Union at the next five meetings of the International Whaling Commission including the related inter-sessional meetings with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule

EXPLANATORY MEMORANDUM

1. According to Article 191.1 of the Treaty on the functioning of the European Union, one of the objectives of the EU 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 Union is committed to the conservation of whales and other cetaceans and has put in place environmental legislation that ensures effective protection in this regard.

2. The Habitats Directive¹ lists all cetacean species in its Annex IV. This means that all whale species are protected from deliberate disturbance, capture or killing within EU 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 EU 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 EU, bans the introduction of cetaceans into the Union for primarily commercial purposes.³ This high level of protection is further reinforced by the EC Marine Strategy⁴ and the Marine Strategy Framework Directive⁵ that is expected to strengthen whales' protection in the EU by fostering the overall objective of good environmental status of the EU oceans and seas.

4. Therefore, the ultimate objective of EU environmental policy in relation to whales is to seek their effective protection. The above mentioned environmental legislation ensures a high level of protection through extensive rules harmonisation.

5. EU policy on whales will not be effective within EU 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.

6. 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 ICRW ('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 EU to become a member would require the ratification of a protocol by all IWC members.

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 Directive 2008/56/EC of the European Parliament and of the Council establishing a Framework for Community Action in the field of Marine Environmental Policy of 17 June 2008.

The Commission adopted a proposal in 1992⁶ to negotiate the accession of the Union to the Convention but the Council has not given any follow up to this proposal. However, the Union has observer status thereto. In the context of the current talks about the reform of the IWC the Commission proposes to support proposals addressing the revision of the Convention including the possibility for the EU to become a party to the IWC.

7. 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.

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

9. The general ban on commercial whaling decided within the IWC is in line with EU policies, as defined by the above-mentioned legislation. It is important that the IWC ensures that whales will be effectively protected worldwide. Therefore, the EU has to express at each IWC meeting its position on such proposals.

10. In accordance with the principle of sincere cooperation reflected in Article 4(3) of the Treaty on the European Union and the principle of the unity in the external representation of the EU, it is essential that Member States prepare 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 EU should be expressed by the Member States acting jointly in the interest of the EU within the IWC. It is also important that the two remaining Member States that are not yet Parties to the IWC accelerate their accession procedure. Only acting together and developing EU position the EU would stand a chance to ensure the development and enforcement of an adequate and effective international regulatory framework for the protection of whales.

11. To this end, the Commission is proposing a decision to the Council with the legal bases: 192 (environment policy) and Article 218 (9) for the purpose of establishing the position to be adopted on behalf of the EU in a body set up by an agreement when that body will adopt decisions with legal effects. With due regard to the essentially environmental objectives, which the European Union should pursue in relation to the IWC at this juncture, Article 43 of the Treaty on the Functioning of the European Union is not proposed as part of the operational legal basis of this decision. This is without prejudice to the exclusive competence of the European Union in the field of the conservation of the marine biological resources pursuant to the provisions of Article 3(1)(d) in conjunction with Article 38 and Annex I of the Treaty and thus of all living aquatic resources under the Common Fisheries Policy pursuant to Council Regulation (EC) No 2371/2002⁷. This shall not create a precedent for any future

⁶ 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.

⁷ Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59-80

negotiations about the conservation and management of living aquatic resources falling under the said regulation.

12. The IWC decisions to amend the Schedule to the Convention have legal effects as they become effective within a prescribed period without the need for ratification⁸. 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. It is not possible for the Union 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 each IWC meeting. In addition, as the proposed objective of the Union is to support the development of a comprehensive international framework covering all whaling activities and to oppose in general initiatives to lift the moratorium on commercial whaling, the Council can already establish the EU position for future IWC meetings.

13. Furthermore, the Union should also support amendments to the Schedule aimed at setting up whale sanctuaries.

14. This proposal for a Council Decision builds on the Council Decision that was adopted by the Environment Council 2 March 2009 on the basis of a proposal by the Commission⁹. The adoption of the Council Decision of 2009 allowed the Union to coordinate its position on a number of issues during three annual meetings of the IWC including the related inter-sessional meetings.

In view of the above, at the next five meetings of the International Whaling Commission (IWC) including the related inter-sessional meetings the Union's position shall be in accordance with the Annex to this Decision.

⁸ 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.

⁹ COM(2008) 711 final

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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 191 (1), in conjunction with Article 218 (9), thereof,

Having regard to the proposal from the European Commission¹⁰,

Whereas:

- (1) Article 191.1 of the Treaty on the Functioning of the European Union states that one of the objectives of EU environment policy is the promotion of measures at international level to deal with regional or worldwide environmental problems;
- (2) Within the Union, Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)¹¹ lists all cetacean species as species of EU interest and requires Member States to maintain these species in, or restore them to, a favourable conservation status in those parts of their territory to which the Treaty applies. All cetaceans are listed in its Annex IV. Therefore, all whale species are protected from deliberate disturbance, capture or killing within EU 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,¹² implementing the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in the EU, bans the introduction of cetaceans into the Union for primarily commercial purposes¹³;
- (4) Whales are migratory species. Consequently, EU policies and legislation relating to whales will be more effective within EU waters if it is backed by coherent worldwide action;

¹⁰ OJ C , , p. .

¹¹ OJ L 206, 22.7.1992, p. 7.

¹² OJ L 61, 3.3.1997, p. 1.

¹³ 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.

- (5) 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 (ICRW) signed in 1946. Membership of the IWC is only open to governments. Currently, twenty-five Member States of the European Union are parties to the IWC¹⁴. The European Union has observer status at the IWC and it is represented by the Commission;
- (6) 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;
- (7) Since the 60th annual meeting of the IWC in Santiago de Chile in June 2008 the IWC has been discussing a possible reform of the organisation. Member States should endeavour to participate constructively in all discussions taking account of the objective to ensure an effective international regulatory framework;
- (8) In view of the evolving situation within the IWC and the consequent need for the position of the EU to take account of new developments, the Commission will put forward further proposals to introduce modifications to this Decision, where appropriate;
- (9) 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 provides for detailed whaling regulations with respect to the conservation and utilization of whale resources. Its provisions and amendments thereto are binding on Parties unless a Party formally objects to an amendment in accordance with Article V (3) of the ICRW;
- (10) Proposals for decisions to amend the Schedule adopted within the IWC may have legal effects and affect the achievement of the objectives of EU policies and legislation in relation to cetaceans. Some of the proposals regularly put forward for decision at meetings 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 an EU position;
- (11) With due regard to the essentially environmental objectives, which the European Union should pursue in relation to the IWC at this juncture, and for the reasons of expediency in the light of the related discussions that took place in 2008, Article 43 of the Treaty on the Functioning of the European Union is not proposed as part of the operational legal basis of this decision. This is without prejudice to the exclusive competence of the European Union in the field of the conservation of the marine biological resources pursuant to the provisions of Article 3(1)(d) in conjunction with Article 38 and Annex I of the Treaty and thus of all living aquatic resources under the

¹⁴ Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Poland, Portugal, Slovak Republic, Slovenia, Spain, Sweden, UK, Romania. Bulgaria, Lithuania (April 2011)

Common Fisheries Policy pursuant to Council Regulation (EC) No 2371/2002¹⁵. This shall not create a precedent for any future negotiations about the conservation and management of living aquatic resources falling under the said regulation;

- (12) Member States have a duty of sincere cooperation under Article 4 (3) of the Treaty on the European Union and cannot take on obligations outside the framework of EU legislation which might affect Union rules or alter their scope. It is essential that the Union speaks with one voice on the basis of agreed EU positions in order to effectively pursue Unions interests towards third parties. The credibility of the EU depends on the ability to present a strong, coordinated EU position;
- (13) The European Union being an observer at the IWC, the EU position in relation to matters within its competence should be decided by the Council and expressed by the Member States acting jointly in the interest of the Union;
- (14) In order to strengthen the Union's position in the context of the IWC a revision of the International Convention for the Regulation of Whaling (ICRW) signed in 1946 with the possibility for the EU to become a party to the IWC should be supported;
- (15) At the next five meetings of the IWC including the related inter-sessional meetings the Union and the Member States should cooperate closely to ensure that any amendments to the ICRW and its Schedule are compatible with the Union's policy and law,

HAS ADOPTED THIS DECISION:

Article 1

The position of the European Union at the next five meetings of the International Whaling Commission (IWC) including the related inter-sessional 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 Union.

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 an EU 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.

¹⁵ Council Regulation (EC) 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy, OJ L 358, 31.12.2002, p. 59-80

Done at Brussels,

*For the Council
The President*

ANNEX

1. The overarching objective of the European Union in relation to the IWC is to ensure an effective international regulatory framework for the conservation and management of whales guaranteeing a significant improvement in the conservation status of whales in the long term and bringing all whaling operations under IWC control.

2. The Member States acting jointly in the interest of the Union shall take the following position on proposals for decisions by the IWC at its next five meetings and the related inter-sessional meetings:

- (a) Support the maintenance of the moratorium on commercial whaling in the Schedule;
- (b) Oppose any proposals regarding new types of whaling, currently not envisaged in the Convention, unless such proposals involve only local consumption, ban international trade, guarantee a significant improvement in the conservation status of whales in the long term, ensure a central role of the Scientific Committee in determining additional conditions for such whaling activities and bring all whaling operations by IWC members under IWC control;
- (c) Support proposals for the creation of whale sanctuaries;
- (d) Support proposals for the management of aboriginal subsistence whaling that ensures that the conservation of the relevant stocks is not compromised, having due regard to the precautionary principle and the advice of the Scientific Committee, and that whaling operations are properly regulated and catches remain sustainable within the scope of subsistence needs for local use;
- (e) Support proposals aimed to end the conduct of "scientific whaling" outside IWC control;
- (f) Support proposals to specify a mechanism and timetable for addressing the revision of the International Convention for the Regulation of Whaling (ICRW) including the issues of scientific whaling, whaling under objections as well as new and emerging threats to cetaceans, to ensure that all whaling activities effectively come under IWC control. The proposals for the revision of the ICRW should also include a reliable regular review and compliance mechanism as well a detailed roadmap for the implementation of the revision;
- (g) Require that the proposals for the revision of ICRW include the possibility for the EU to become of party to the IWC so that the EU can represent itself at the meetings.