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COMMISSION OF THE EUROPEAN COMMUNITIES

Brussels, 6.11.2008
COM(2008) 711 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 International Convention on the Regulation of Whaling and its Schedule

(presented by the Commission)

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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 Marine Strategy Framework 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.

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.

- (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) 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.
- (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 ('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 1992⁶ 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.
- (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 EC policies, as defined by the above-mentioned legislation. It is important that the IWC ensures that whales will be effectively protected worldwide. Therefore, the 21 EU Member States that are IWC members⁷ have to express at each IWC meeting their position on such proposals which fall within Community competence.
- (10) 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

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

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 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 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: 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. With due regard to the essentially environmental objectives, which the European Community should pursue in relation to the IWC at this juncture, Article 37 of the Treaty is not proposed as part of the operational legal basis of this decision. This is without prejudice to the exclusive competence of the European Community in the field of the resources of the sea pursuant to the provisions of Article 3(1)(e) in conjunction with Article 32 and Annex I of the Treaty and thus of all living aquatic resources under the Common Fisheries Policy pursuant to Council Regulation (EC) No 2371/2002⁸. 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) 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 ratification⁹. 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 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 each IWC meeting. In addition, as the proposed objective of the Community 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 Community position for future IWC meetings.
- (13) 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).

⁸ 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

⁹ 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.

- (14) This proposal for a Council Decision builds on the Council Decision that was adopted by the Environment Council 5 June 2008 on the basis of a proposal by the Commission¹⁰. The adoption of the Council Decision allowed the Community to coordinate its position on a number of issues during the 60th annual meeting of the IWC in June 2008 in Santiago de Chile.

¹⁰ COM (2007)821 final

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

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the Commission¹¹,

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) Within the Community, Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive)¹² lists all cetacean species as species of Community 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 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,¹³ 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 purposes¹⁴.
- (4) Whales are migratory species. Consequently, EC policies and legislation relating to whales will be more effective within Community waters if it is backed by coherent worldwide action.
- (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.²¹

¹¹ OJ C , , p. .

¹² OJ L 206, 22.7.1992, p. 7.

¹³ OJ L 61, 3.3.1997, p. 1.

¹⁴ 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.

Member States of the European Union are parties to the IWC¹⁵. The European Community 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) At the 60th annual meeting of the IWC in Santiago de Chile in June 2008 an important process for determining a way forward for the IWC was launched. Member States should endeavour to participate constructively in all discussions taking account of the objective to ensure an effective international regulatory framework.
- (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. 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.
- (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 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 a Community position.
- (10) With due regard to the essentially environmental objectives, which the European Community should pursue in relation to the IWC at this juncture, Article 37 of the Treaty is not proposed as part of the operational legal basis of this decision. This is without prejudice to the exclusive competence of the European Community in the field of the resources of the sea pursuant to the provisions of Article 3(1)(e) in conjunction with Article 32 and Annex I of the Treaty and thus of all living aquatic resources under the Common Fisheries Policy pursuant to Council Regulation (EC) No 2371/2002¹⁶. This shall not create a precedent for any future negotiations about the conservation and management of living aquatic resources falling under the said regulation.
- (11) 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.
- (12) The Community being an observer at the IWC, the Community 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 Community.
- (13) At IWC meetings the Community and the Member States should cooperate closely to ensure that any amendments to the ICRW and its Schedule are consistent with the objectives of Community policies and legislation on whales.

¹⁵ Austria, Belgium, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Slovak Republic, Slovenia, Spain, Sweden, UK, Romania.

¹⁶ 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

HAS DECIDED AS FOLLOWS:

Article 1

The position of the Community at the meetings of the International Whaling Commission (IWC) 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.

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 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 Community shall take the following position on proposals for decisions by the IWC:
 - (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, that could undermine the maintenance of the moratorium on commercial whaling, unless such proposals would guarantee a significant improvement in the conservation status of whales in the long term and bring all whaling operations by IWC members under IWC control;
 - (c) Support proposals for the creation of whale sanctuaries according to the IWC rules;
 - (d) Support proposals for the management of aboriginal subsistence whaling, on the condition 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 within the scope of documented and recognised needs;
 - (e) Support proposals aimed to end the conduct of "scientific whaling" outside IWC control;
 - (f) Oppose any proposals to amend the rules of procedure of the IWC to broaden the scope of secret ballot.