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## **PROPOSAL**

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From:	Secretary-General of the European Commission, signed by Mr Jordi AYET PUIGARNAU, Director
date of receipt:	4 September 2017
To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
No. Cion doc.:	COM(2017) 463 final
Subject:	Proposal for a COUNCIL DECISION on the position to be adopted, on behalf of the European Union, at the next three meetings of the International Whaling Commission including related inter-sessional meetings and actions

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Delegations will find attached document COM(2017) 463 final.

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Encl.: COM(2017) 463 final



Brussels, 4.9.2017  
COM(2017) 463 final

2017/0215 (NLE)

Proposal for a

**COUNCIL DECISION**

**on the position to be adopted, on behalf of the European Union, at the next three meetings of the International Whaling Commission including related inter-sessional meetings and actions**

## EXPLANATORY MEMORANDUM

### **1. SUBJECT-MATTER OF THE PROPOSAL**

The present proposal concerns a Council Decision establishing the position to be adopted on behalf of the Union related to meetings of the International Whaling Commission (IWC) under the International Convention for the Regulation of Whaling (ICRW), including inter-sessional meetings and actions.

It builds on the Council Decisions that were adopted on 2 March 2009 and 13 December 2011 on the basis of proposals by the Commission<sup>1</sup>, which allowed the Union to coordinate its position on a number of issues during three meetings of the IWC (in 2012, 2014 and 2016) including in the related inter-sessional meetings.

The multi-year nature of the previous Decisions and the stable policy approach that they provided allowed the EU and its Member States to become more pro-active on IWC matters with the result that the EU is increasingly asked by third country governments to take part in activities at short notice. It is therefore proposed that the future Council Decision should not just govern IWC related meetings, but should also be used to act inter-sessionally, within the policy framework set out in the decision, for example in demarches.

### **2. CONTEXT OF THE PROPOSAL**

#### **2.1. The International Convention for the Regulation of Whaling**

The International Convention for the Regulation of Whaling (ICRW) signed in 1946 ensures both the conservation and the sustainable management of whales at global level.

The Convention includes a legally binding Schedule, which designates protected and unprotected species, open and closed waters including sanctuary areas, and sets catch limits for commercial and subsistence whaling. The Convention also regulates scientific research whaling. In this context, the Schedule asks Contracting Governments to submit scientific permit proposals for scrutiny by the Scientific Committee before their issuance. The permits are issued by individual countries.

As a Convention that pre-dates the Treaty of Rome, ICRW membership is restricted to Governments and therefore the European Union only has observer status<sup>2</sup>. Currently, twenty-five EU Member States are Contracting Governments to the ICRW<sup>3</sup> which counts eighty seven Contracting Governments in total.

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<sup>1</sup> COM(2008) 711 final and COM(2011) 495 final

<sup>2</sup> An amendment to the Convention allowing the EU to become a member would require the ratification of a Protocol by all IWC members. In 1992, the Commission adopted a proposal to negotiate the accession of the Union to the Convention but the Council has not given any follow up to it (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).

<sup>3</sup> Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Ireland, Italy, Lithuania, Luxembourg, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, the United Kingdom.

## **2.2. The International Whaling Commission**

The competent body governing the implementation of the Convention is the International Whaling Commission (IWC) which meets every two years. The IWC exercises its basic responsibilities for both sustainable management and conservation by making amendments to the Schedule to the ICRW in response to requests from Contracting Governments. Amendments have to be carried by a three quarters majority of voting IWC members. IWC decisions to amend the Schedule to the Convention have direct legal effect as they come into force within a prescribed period without the need for ratification<sup>4</sup>. In virtually all IWC meetings, amendments to the Schedule to the Convention have been proposed to authorise whaling under certain conditions or to set up Sanctuaries.

Over time, the IWC has considerably evolved and has become the international organisation of reference for all aspects related to whales and whaling, undertaking activities such as field research programmes, population modelling, conservation plans, threats knowledge and management. The IWC will be increasingly influenced by Agenda 2030 and the Sustainable Development Goals in general, and particularly Sustainable Development Goal 14<sup>5</sup>.

Financial contributions from Contracting Governments form the IWC's core income, but additional voluntary contributions are made by member governments and civil society organisations to support particular work programmes managed by the IWC.

The IWC receives advice from its Scientific Committee, which assists it notably in assessing the status of stocks, deciding catch limits, analyzing information relating to whales and whaling. The Scientific Committee also reviews and comments on whaling permits for purpose of scientific research<sup>6</sup> before they are issued by Contracting Governments to their nationals<sup>7</sup>.

The dual mandate of the IWC for both managing whaling and conserving whales has led to extremely polarised positions between Contracting Governments supporting whaling and Contracting Governments focused on strict conservation. This situation weakens the IWC, which, however, remains the only existing framework that can potentially resolve issues that are of global concern.

## **3. POSITION TO BE ADOPTED ON BEHALF OF THE UNION**

### **3.1. The need for a Union's position**

Decisions to amend the Schedule adopted within the IWC may affect the achievement of the objectives of EU policies and legislation in relation to cetaceans.

According to Article 191 (1) of the Treaty on the Functioning of the European Union (TFEU), one of the objectives of the EU environment policy is the promotion of measures at

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<sup>4</sup> 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.

<sup>5</sup> SDG 14: “Conserve and sustainably use the oceans, seas and marine resources for sustainable development”.

<sup>6</sup> Article VIII of the Convention.

<sup>7</sup> Paragraph 30 of the Schedule requires explicitly that scientific permits be provided by the Contracting Government to the Scientific Committee before they are issued to allow the Scientific Committee to review and comment on them.

international level to deal with regional or worldwide environmental problems. This objective encompasses the conservation of species at global level, including whales and other cetaceans, and the European Union has put in place environmental legislation that promotes their effective protection through extensive harmonisation of rules at EU level.

The Habitats Directive<sup>8</sup> lists all cetacean species in its Annex IV. This means that all whale species and other cetaceans are protected from deliberate disturbance, capture or killing within EU waters. This also provides an EU policy context for positions on issues such as noise pollution, ship strikes, entanglement and by-catch. The Habitats 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.

Council Regulation 338/97/EC on the protection of species of wild fauna and flora by regulating trade therein,<sup>9</sup> which implements 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. This high level of protection is further reinforced by the Marine Strategy Framework Directive<sup>10</sup> that should improve the quality of the environment for whales and other cetaceans by promoting the good environmental status of the EU oceans and seas.

However, due to the fact that whales migrate, EU policy will not be effective within EU waters if it is not backed by coherent worldwide action under a comparable international regulatory framework. That framework is provided by the International Convention for the Regulation of Whaling.

EU membership of Multilateral Environment Agreements such as the Convention on Biological Diversity, the UN Framework Convention on Climate Change and the Stockholm Convention on Persistent Organic Pollutants as well as our ratification of the Minamata Convention on Mercury also have implications for a range of topics that have been the subject of IWC Resolutions.

### **3.2. Individual policy issues**

#### *3.2.1. Commercial whaling, small type coastal whaling and criteria for scientific permits*

The IWC regulates **commercial whaling** and decided in 1982 that there should be a moratorium on commercial whaling on all whale species and populations from 1986 onwards.

Norway and Iceland are not bound by the moratorium as they have respectively issued an objection<sup>11</sup> and a reservation<sup>12</sup> to it. They continue to take whales commercially at present<sup>13</sup>. These two countries establish their own catch limits but provide information on their catches and associated scientific data to the Commission. Both Norway and Iceland claim that they set their catch limits on the basis of the Revised Management Procedure (RMP) developed by the

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<sup>8</sup> Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ L 206, 22.7.1992, p. 7.

<sup>9</sup> OJ L 61, 3.3.1997, p. 1.

<sup>10</sup> 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.

<sup>11</sup> Article V(3) of the Convention allows Contracting Governments to present objection to any amendment to the Schedule, which result in them not being bound by this amendment.

<sup>12</sup> Iceland withdrew from the IWC in 1992 but rejoined in 2002 with a reservation to the moratorium.

<sup>13</sup> The Russian Federation has also registered an objection to the moratorium but does not exercise it.

IWC to estimate sustainable catch limits for commercial whaling. The strict application of the RMP in the way recommended by the Scientific Committee is a key element for avoiding setting excessive catch limits.

Japan is bound by the moratorium on commercial whaling but grants special permits under Article VIII of the ICRW, which allows killing, taking and treating whales "for purposes of scientific research subject to such restrictions as to number and subject to such other conditions as the Contracting Government thinks fit". However, in 2014, the International Court of Justice ruled that Japan's main "scientific whaling" programme was unlawful as it was not of sufficient scientific quality to be justified as being clearly "for purposes of scientific research"<sup>14</sup>. Moreover, the need for lethal sampling to achieve the stated scientific objectives was not demonstrated. Nevertheless, Japan resumed "scientific" whaling in the Antarctic in 2016 and continued in 2017 on the basis of a new programme and without following the revised review process for whaling permits as requested in relevant IWC Resolutions<sup>15</sup> to which Japan objected.

Despite the continuation of whaling by these countries, the moratorium on commercial whaling has contributed to protecting whales over the last thirty years. Nevertheless, many whale populations are still critically depleted also because of an increasing number of non-whaling threats, such as entanglement in fishing gear, collision with ships, pollution including underwater noise, habitat degradation, etc. Avoiding the pressure of commercial hunting remains therefore important to help these populations recover. Consequently, the general ban on commercial whaling decided within the IWC should remain. It is in line with EU policies and required by the EU.

Japan has also sought to persuade the IWC to endorse a new category of whaling, **small type coastal whaling (STCW)**<sup>16</sup>, which would, in effect, partially lift the moratorium on commercial whaling. The EU should oppose proposals introducing new whaling categories and support the finding of the International Court of Justice<sup>17</sup> that the ICRW divides whaling into three categories: commercial whaling and aboriginal subsistence whaling (both covered by the Schedule) and special permit whaling under Article VIII. This will prevent loop-holes in the ban on commercial whaling and help preventing this concept being applied close to EU waters.

In reference to "**scientific**" whaling, the EU should remain firm that Article VIII allowing special permit whaling cannot be used to justify what is primarily commercial whaling. Abuse of the Article defies the spirit of the moratorium and the will of the IWC as expressed in various resolutions. To be acceptable to the EU as legitimate under Article VIII, proposals for special permits must satisfy the considerations set out by the International Court of Justice in its judgment of 31 March 2014 on Whaling in the Antarctic. This means strict compliance with Resolution 2014-5 on Whaling under Special Permit, which requires that two cumulative

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<sup>14</sup> Paragraphs 227 & 245 of the ICJ Judgment of 31 March 2014, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*.

<sup>15</sup> IWC Resolution 2014-5 on Whaling under Special Permit and IWC Resolution 2016-2 on Improving the Review Process for Whaling under Special Permit. Japan objected to these two Resolutions considering that "it is aimed at unduly limiting the implementation of Japan's scientific research programmes regardless of scientific value and in a manner inconsistent with the Convention".

<sup>16</sup> Small Type Coastal Whaling (STCW) is a type of whaling characterized by the use of small boats, hunting whales (minke whales and other small whales) on day trips in national waters for commercial purpose. Japan has sought STCW catch limits for communities which it said were suffering distress as a result of the moratorium.

<sup>17</sup> Paragraphs 229 and 230 of the ICJ judgment of 31 March 2014

elements must be satisfied for issuing a special permit: namely that the lethal sampling is “scientific research” and is only “for the purposes of” that research. In practical terms that would mean that the Scientific Committee was satisfied that any Contracting Party wanting to issue special permits has demonstrated that the expected output of the project was justifiable as scientific research, has carefully considered whether the use of non-lethal sampling could meet the research objective, has concluded that this was not feasible, and has demonstrated that the sample sizes proposed were strictly related to scientific need and were not larger than reasonable for the scientific objective.

Moreover, the EU should promote the view, eventually accepted by all parties to the ICJ case, that the IWC has a legitimate role to play in debating whaling under special permit. The EU should therefore continue to advocate approaches guaranteeing that, before being issued, any special permit is considered by the IWC Scientific Committee and by the IWC itself and complies with the recommendations thereon.

### 3.2.2. *Conservation*

In 1946, the ICRW was one of the first international agreements to make a link between conservation and sustainable exploitation. Over time, impacts from non-whaling threats and conservation concerns have increased and become one of the biggest challenges for the IWC.

A Conservation Committee was created in 2003. It collaborates closely with the Scientific Committee to address a range of threats to whales and their habitats. In 2016, the IWC, with the support of EU Member States Contracting Governments on the basis of an EU coordinated position, adopted a new Strategic Plan<sup>18</sup>, accompanied by a work programme, which identifies priority threats to cetaceans (ship strikes, marine debris, bycatch, anthropogenic sound, chemical pollution and climate change) as well as priority actions (sustainable whale watching, conservation management plans, sanctuaries, data collection and reporting). In addition, a new emphasis has been put on the contribution of whales and other cetaceans to regulating ecosystems and providing ecosystem services in both their life and death.

The EU should support the further development of the IWC's growing involvement in conservation, which is in line with EU policy and legislation.

As part of its strong policy commitment to conservation, the EU should continue to support all proposals for Whale Sanctuaries<sup>19</sup>. These proposals require a modification of the Schedule by a three-quarter majority of votes to be adopted. Reaching this majority will require active preparatory discussions with the Contracting Governments that habitually vote against Sanctuaries. The EU and its Member States should also encourage greater transparency by proposing that the provisions in the Schedule dealing with Sanctuaries should be placed in a separate section within that title<sup>20</sup>.

Equally, IWC proposals designed to improve the welfare of whales should receive support. The work on animal welfare may include but is not limited to entanglements, ship strikes,

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<sup>18</sup> [https://iwc.int/private/downloads/YTtNWzZ21VOaPZRjvTQGng/CC\\_StrategicPlan2016\\_26\\_FINAL.pdf](https://iwc.int/private/downloads/YTtNWzZ21VOaPZRjvTQGng/CC_StrategicPlan2016_26_FINAL.pdf)

<sup>19</sup> Two Sanctuaries – the Indian Ocean Sanctuary and the Southern Ocean Sanctuary – are currently designated by the International Whaling Commission, both of which prohibit commercial whaling. An additional proposal for a Sanctuary in the South Atlantic Ocean has been repeatedly submitted to the Commission in recent years but has so far not achieved the three-quarters majority of votes needed.

<sup>20</sup> Currently, these provisions are included in section III of the Schedule, entitled “capture”.

mass stranding, whale watching, noise pollution, improvement of killing and euthanasia methods, etc.

In recent years the IWC has started to concern itself with issues related to disease in cetaceans, particularly those that may be related to human activities and those capable of spreading disease between animals and humans, which could pose a risk to aboriginal subsistence hunting communities when consuming whale products derived from non-commercial hunts. The EU and its Member States should support such debates, providing that they are based on science and that consideration by IWC adds value to the work of other fora.

### 3.2.3. *Aboriginal Subsistence Whaling*

Aboriginal Subsistence Whaling<sup>21</sup> (ASW) is covered in successive Schedules and its regulation is a fundamental and integral part of the duties performed by the IWC, which sets ASW catch limits every six years (next time in 2018). ASW is not subject to the moratorium as it is not commercial whaling. It is the responsibility of governments to provide evidence of the needs of their indigenous people in the form of a “needs statement” which details the cultural, subsistence and nutritional aspects of the hunt, products and distribution. The Scientific Committee provides advice on the sustainability of proposed hunts and safe catch limits and, taking account of the needs statement and the Scientific Committee opinion, the IWC decides catch limits for each hunt. However, this has often been a contentious issue, both at EU and IWC level. The situation is not helped by the fact that the Schedule recognises that ASW catches are to satisfy aboriginal subsistence needs<sup>22</sup> but does not define these. Providing such a definition is particularly delicate considering the complex notions, the variety of hunts and community particularities that it should cover.

The EU as a whole and Denmark on behalf of Greenland took important initiatives to defuse tensions over ASW. In 2014, the IWC adopted Resolution 2014-1 on the need to regulate ASW in the future through a more consistent and long-term approach. It also requested the Scientific Committee and the ASW Sub-Committee to undertake specific tasks<sup>23</sup> before the next round of ASW quota-setting in 2018 to provide a more solid basis for deciding on catch limits.

In addition to Resolution 2014/1, experts from different backgrounds including representatives of the ASW communities discussed the notion of subsistence needs in relation to the rights of indigenous peoples<sup>24</sup>. They recommended increasing the understanding of the rights, enhancing the role of indigenous peoples in the IWC and creating links between the IWC and other relevant fora. They also suggested that the "needs statements", judged as constraining the rights of indigenous peoples to use their resources, be replaced by a less demanding document. Finally, they proposed an improved process and timetable for considering ASW catch limits after 2018.

At IWC 66 in October 2016, the EU and its Member States Contracting Governments were able to support in broad terms the need to pay greater attention to the rights of indigenous

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<sup>21</sup> Aboriginal subsistence whaling is the hunting of whales carried out by aboriginal groups who have a tradition of whaling and hunt whales for their subsistence.

<sup>22</sup> Schedule, paragraph 13 (a).

<sup>23</sup> These tasks consisted in completing the work on Strike Limit Algorithms (SLAs) for the Greenland hunts and to address requests for providing standardised needs statements as well as a better understanding of the relationship between needs and consumption patterns and a proposal to update the Schedule to reflect the SLA approach.

<sup>24</sup> ASW Expert Workshop, Maniitsoq/Greenland, 2015.



peoples in the work of the IWC and the proposal from the experts to improve the process for setting ASW catch limits. However, there was disagreement in relation to replacing the term 'needs statement'. As a result, IWC 66 agreed that the ASW Working Group should give further consideration to these issues and make recommendations as appropriate to IWC 67 in 2018. In that perspective, it will be important that the two EU Member States most involved in the discussions on these issues work together to ensure that the recommendations to IWC 67 can be supported by the EU as a whole.

In relation to indigenous peoples' rights, the EU has long promoted the respect of human rights everywhere in the world and has a wide range of policies that are relevant to indigenous peoples<sup>25</sup>. To demonstrate its support for a rights-based approach, the EU could follow the recommendations from the experts<sup>26</sup> and propose a resolution on the relevance of recent developments in the rights of indigenous peoples to the IWC as well as encourage exploring mechanisms to improve the status of indigenous delegates to IWC gatherings. The EU could also consider expanding the proposed Schedule amendments for IWC 67 to change the terminology from *aborigines* to *indigenous peoples*.

The other recommendations on indigenous peoples' rights, namely commissioning a survey of instruments on such rights, inviting the UN Special Rapporteur on the Rights of Indigenous Peoples to IWC meetings on a regular basis, appointing an IWC representative to attend a session of the UN Permanent Forum on Indigenous Issues and exploring the potential benefits of the Secretariat joining the Inter-Agency Support Group on Indigenous Issues, seem rather disproportionate for a small organisation with only four members practicing ASW. Providing relevant information on these aspects to IWC can be done more effectively and at lower cost by relying on statements from the relevant Contracting Governments and ASW delegates.

In taking forward a rights-based approach, the EU will need to be aware that the rights of indigenous peoples are not absolute and can be affected by reasonable and objectively justified action. For instance, submitting information to support ASW catch limits' requests is reasonably and objectively justified in light of the IWC's duty to set catch limits for ASW to satisfy aboriginal subsistence needs. Limiting an ASW quota due to concerns about sustainability of the hunt can also find a reasonable and objective justification in the IWC's mandate to manage whales' populations on a global basis.

### 3.3. Institutional issues

Given that the EU has observer status, the positions to be taken on behalf of the EU within the IWC are expressed by the Member States acting jointly in the interest of the EU, in the way that will best promote the EU recognition and without prejudice to the provisions of the Treaty on the representation of the EU.

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<sup>25</sup> The EU supported the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNGA 61/295) at the UN General Assembly in 2007 and the Outcome Document (UNGA 69/2) of the World Conference on Indigenous Peoples held as part of the High-Level Plenary of the UNGA in 2014. Both documents stress the rights of indigenous peoples to the resources they have traditionally used and the need for States to protect those rights and to cooperate and consult with indigenous peoples. On 15 May 2017, the Council of the EU adopted Conclusions (Doc. 8814/17, 15 May 2017) which reaffirm its support for the rights of indigenous peoples and recognise that there is room for applying this policy framework more effectively in multilateral cooperation, namely by further enhancing opportunities for dialogue and consultation at all levels of EU cooperation.

<sup>26</sup> Recommendations 2 and 6 on page 21 of IWC/66/ASW Rep01

Although it seems unlikely that the efforts by the current Japanese Chair of the IWC to initiate discussions on "The IWC in the Future" will lead to calls for treaty amendments, the EU and its Member States should take advantage of any opportunities that arise which would advance the cause of EU membership.

In the absence of EU membership it becomes even more important that Member States use their collective weight to the full to defend EU positions in the IWC, in accordance with the principle of sincere cooperation reflected in Article 4(3) of the Treaty on European Union and the principle of the unity in the external representation of the EU. A united EU position is also essential as it is a prerequisite for achieving consensus or unanimity within the IWC, which is especially important in light of the finding of the International Court of Justice that IWC Resolutions may be relevant for the interpretation of the Convention or its Schedule if they are adopted by consensus or unanimous vote<sup>27</sup>.

Maximising the EU's collective weight requires that all Member States are IWC Contracting Governments and are in a position to vote on Schedule amendments and other Resolutions. Currently, twenty-five EU Member States are Contracting Governments to the IWC and it is important that the three that are not yet (Malta and Latvia) or no longer (Greece) accede as soon as possible. Equally, all Member States need to pay their assessed contributions on time to have voting rights<sup>28</sup>.

Not all Member States have to send national representatives from capitals to IWC meetings to maximise the influence of the EU as a whole. Local Embassy staff can be given credentials. Alternatively, if a Member State has no representation in an IWC meeting host country and in accordance with practice under other legally binding agreements, a member of another Member State's delegation could be given credentials by the appropriate national authority in advance of the meeting.

The duty of sincere cooperation means that EU Member States should not vote against each other and should make all efforts to reach a common position.

Since there are eighty seven Contracting Governments to the ICRW, the current level of twenty two voting Member States represents one quarter of the voting IWC membership.

Thus both basic policy principles and voting strength require the EU as a whole to reach agreement well before IWC meetings on IWC proposals.

#### **4. LEGAL BASIS**

##### **4.1. Procedural legal basis**

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.'

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<sup>27</sup> Paragraph 46 of the ICJ judgment of 31 March 2014.

<sup>28</sup> Currently 3 Member States have their voting rights suspended and in one case arrears are owed for 3 years.

Article 218(9) TFEU applies regardless of whether the Union is a member of the body or a party to the agreement at issue.<sup>29</sup>

The International Whaling Commission is a body set up by an agreement, namely the International Convention on the Regulation of Whaling. The acts which the IWC is called upon to adopt constitute acts having legal effects. The envisaged acts are capable of decisively influencing the content of EU legislation (see section 3.1. above). The envisaged acts do not supplement or amend the institutional framework of the agreement.

The procedural legal basis for the proposed decision, therefore, is Article 218(9) TFEU.

#### **4.2. Substantive legal basis**

In the context of IWC, the Union's overarching objective 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 and other cetaceans and bringing all whaling operations by IWC members under IWC control. In the previous proposals the main objective and content of the envisaged act has been considered to relate predominantly to environment and therefore the substantive legal basis of Article 191(1) TFEU has been used, while Article 43(2) TFEU has not been proposed as part of the operational legal basis for the decision on the Union's position at the IWC (see also COM(2011)495 and COM(2008)711). It is proposed, for the time being, to propose the same legal basis as in 2008 and 2011. It is to be underlined that the delineation of Articles 191(1) and 43(2) TFEU is the object of certain pending Court cases<sup>30</sup>. This proposal for the substantive legal basis is strictly 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, which is conducted pursuant to Regulation (EU) No 1380/2013<sup>31</sup>. This approach shall not create a precedent for any future negotiations about the conservation and management of living aquatic resources falling under the said regulation and in particular this approach may have to be adapted in light of the outcome of the relevant pending Court cases on the delineation of Articles 191(1) and 43(2) TFEU.

#### **4.3. Conclusion**

For the time being the legal basis of the proposed decision should be Article 191(1) TFEU in conjunction with Article 218(9) TFEU.

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<sup>29</sup> Case C-399/12 Germany v Council (OIV), ECLI:EU:C:2014:2258, paragraph 64.

<sup>30</sup> Cases C-626/15 and C-659/16, Commission/Council (Weddell Sea cases). See also preliminary ruling request in case C-683/16.

<sup>31</sup> Regulation (EU) No 1380/2013 of the European Parliament and of the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC, OJ L 354, 28.12.2013, p. 22.

Proposal for a

**COUNCIL DECISION**

**on the position to be adopted, on behalf of the European Union, at the next three meetings of the International Whaling Commission including related inter-sessional meetings and actions**

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 Commission,

Whereas:

- (1) The International Convention for the Regulation of Whaling (ICRW) signed in 1946 set up the International Whaling Commission (IWC), which is the competent international organisation regarding the conservation and management of whales at global level.
- (2) A Schedule that governs the conduct of whaling throughout the world is annexed to the Convention as an integral part of it. It provides for detailed whaling regulations with respect to the conservation and utilisation of whale resources. Its provisions and amendments thereto adopted by the IWC are binding on Parties unless a Party formally objects to an amendment in accordance with Article V(3) of the ICRW.
- (3) As a result of a Schedule amendment agreed by the majority of countries represented in the IWC, a moratorium on commercial whaling entered into force in 1986. Leading whaling States have consistently contested the moratorium and still carry out whaling for what they call scientific purposes or under other exceptions.
- (4) It is appropriate to establish the position to be adopted on behalf of the Union in the IWC as decisions to amend the Schedule adopted within the IWC may have legal effects and affect the achievement of the objectives of policies and legislation of the Union 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 position of the Union.

- (5) Membership of the IWC is only open to governments. Currently, twenty-five Member States of the European Union are parties to the IWC<sup>32</sup>. The European Union has observer status at the IWC and is represented by the Commission.
- (6) The Union being an observer at the IWC, the position to be taken on behalf of the Union in relation to matters within its exclusive competence based on Article 3(2) of the Treaty on the Functioning of the European Union because they may affect common rules or alter their scope, should be decided by the Council and expressed by the Member States acting jointly in the interest of the Union.
- (7) In order to strengthen the Union's position in the context of the IWC, any revision of the ICRW allowing the possibility for the Union to become a Party to the IWC should be supported.
- (8) Annex IV of Council Directive 92/43/EEC<sup>33</sup> lists all cetaceans as species of Union interest in need of strict protection. Therefore, all whale species are protected from deliberate disturbance, capture or killing within Union waters. The same Directive also prohibits the keeping, transport and sale or exchange, and offering for sale or exchange, of specimens taken from the wild.
- (9) Council Regulation (EC) No 338/97<sup>34</sup>, which implements the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora in the Union, bans the introduction of cetaceans into the Union for primarily commercial purposes. In addition, Council Regulation (EEC) No 348/81<sup>35</sup> only allows imports of certain products listed in its Annex if they are not to be used for commercial purposes.
- (10) Whales are migratory species. Consequently, Union policies and legislation relating to whales will be more effective within Union waters if backed by coherent worldwide action.
- (11) The Union supports the United Nations Declaration on the Rights of Indigenous Peoples and the Outcome Document of the 2014 World Conference on Indigenous Peoples<sup>36</sup>.
- (12) The position of the Union is to be expressed by the Member States of the Union that are members of the International Whaling Commission, acting jointly.

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<sup>32</sup> Belgium, Bulgaria, Czech Republic, Denmark, Germany, Estonia, Ireland, Spain, France, Croatia, Italy, Cyprus, Lithuania, Luxembourg, Hungary, Netherlands, Austria, Poland, Portugal, Romania, Slovenia, Slovakia, Finland, Sweden, United Kingdom (January 2017). Currently twenty-two of those Member States have voting IWC membership.

<sup>33</sup> Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22.7.1992, p. 7).

<sup>34</sup> Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (OJ L 61, 3.3.1997, p. 1).

<sup>35</sup> Council Regulation (EEC) No 348/81 of 20 January 1981 on common rules for imports of whales and other cetacean products (OJ L 39, 12.2.1981, p. 1).

<sup>36</sup> Council Conclusions on Indigenous Peoples, Doc. 8814/17, 15 May 2017.

HAS ADOPTED THIS DECISION:

*Article 1*

The position of the European Union at the next three meetings<sup>37</sup> of the International Whaling Commission (IWC), including the related inter-sessional meetings and actions, is set out in the Annex.

*Article 2*

The position referred to in Article 1 shall be expressed by the Member States that are members of the IWC, acting jointly.

*Article 3*

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 Union 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. Minor changes to the position may be agreed by the representatives of the Union in the IWC without further decision of the Council.

*Article 4*

This Decision is addressed to the Member States.

Done at Brussels,

*For the Council  
The President*

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<sup>37</sup> IWC 67 in 2018, IWC 68 in 2020 and IWC 69 in 2022.