

The proposed reform of the International Whaling Convention and EU voting rules

This briefing addresses the following question:

Can the EU require its Member States (who are members of the International Whaling Commission (IWC)) to abstain from voting on proposed changes to the International Whaling Convention (and its Schedule) in the IWC's annual meeting in June on the grounds that there is no unanimity within EU Member States with regard to what the EU's position should be (and considering also that the EU is not a party to the International Whaling Convention)?

Summary

A more detailed legal analysis of these points is attached in the Annex to this document.

1. The protection of whales is a matter of EU environmental law and therefore subject to **shared competence** between the EU and its Member States. In addition, the Treaty on the Functioning of the European Union (TFEU) expressly states that the EU's competence to engage in international agreements and negotiations in environmental matters 'shall be without prejudice' to Member States' competence to negotiate in international bodies and conclude international agreements (Article 191(4), TFEU). This means that EU Member States have competence to negotiate and vote in the IWC proceedings. They cannot be required to abstain.
2. However, EU law does impose some boundaries on Member States' (and also EU institutions such as the Commission and the Council's) decision-making powers. Any changes to the International Whaling Convention supported by the EU and/or its Member States must be compatible with EU law:
 - If there is no agreement between Member States about proposed changes to the Convention (e.g. if there is a disagreement on whether the conditions of the 2009 Common Position have been met¹), the decision reached must not affect existing EU law (the common rules). However, as the EU is not a party to the International Whaling Convention or a member of the International Whaling Commission (IWC),

¹ EU Council Decision 7146/09 of 3 March 2009 establishing the position to be adopted on behalf of the European Community at the next three annual meetings and the related inter-sessional meetings of the International Whaling Commission with regard to proposals for amendments to the International Convention on the Regulation of Whaling and its Schedule.

- any decision made by the IWC will not directly affect EU law (i.e. will not affect the common rules).
- Member States and EU institutions must support EU environmental law and policy (the 'acquis communautaire' in relation to environmental policy). This is confirmed by the principle of sincere cooperation which obliges both Member States and the EU itself not only to 'facilitate the achievement of the Union's tasks', but also to 'refrain from any measure which could jeopardise the attainment of the Union's objectives'. Therefore, neither the Commission, nor the Council or the Member States can support positions that are weaker than existing EU environmental rules, but can support rules which are in conformity with (or might even be stronger than) EU environmental policy.
3. The 2009 EU Common Position sets out the EU's position on IWC whaling issues in relation to the 2009 – 2011 IWC annual meetings and the general conditions which need to be satisfied for the EU to agree to any IWC proposals. These general conditions are based on a high level of protection and set some very specific targets (for example, no commercial whaling, whaling only for consumption or scientific purposes within IWC control and meeting high standards of improved conservation - and others).
 4. In order to be able to support or reject any IWC proposals, the EU and its Member States should try and coordinate a joint position. There is no requirement in EU law for unanimity in relation to such a position. Qualified majority voting is the usual decision making process in the Council and for decisions relating to environmental policy and the conclusion of international agreements by the EU (though the latter are not directly applicable in this context).

Conclusion:

1. Any proposed changes to the International Whaling Convention or its Schedule can only be supported by the EU/Member States if they satisfy the conditions set out in the Common Position and the requirements and standards of EU environmental law and **policy**.
2. The EU and Member States should attempt to find a coordinated position on whether these conditions are satisfied by the proposal. Subject to the requirements for meeting the conditions of the Common Position and of EU environmental law, if a minority of Member States disagrees with the EU coordinated position, they must still support the majority's position.
3. The EU cannot require Member States to abstain in a vote against proposals that do not satisfy the Common Position and/or would be contrary to EU law and policy (or indeed to abstain in vote in favour of proposals that would satisfy the Common Position or EU environmental requirements). By doing so, the relevant institutions would themselves be jeopardising the achievement of the Union's objectives and would themselves be in breach of the requirements of EU law.

Annex

Detailed legal analysis

1. Background

The EU is not a party to the International Whaling Convention as it is not a 'contracting government'. This means that the Convention, its Schedule and any future reforms are not automatically a part of EU law and are therefore not binding on the EU. However, this does not mean that Member States are free of the requirements of EU law in their decisions regarding proposals to reform or amend rules under the International Whaling Convention and its Schedule.

Because the protection of whales is governed by EU environmental law, both the EU and its Member States share competence for legislation on whaling. This means that, at least to the extent that there are EU measures dealing with whaling, the EU has competence, and therefore EU law applies. Therefore it is necessary for Member States to take EU law into consideration when negotiating changes in the Convention.

2. The question of competence

Under EU law the protection of whales is, and has always been, strictly a matter of EU environmental law. EU environmental law, including measures relating to the protection of whales, is subject to the shared competence of the EU and its Member States.

The environmental protection objectives and principles set out in Articles 191 and 192, TFEU therefore apply to whaling issues. This is particularly clear in relation to the preservation and protection of the quality of the environment, the prudent and rational utilisation of natural resources, the promotion of measures at international level to deal with regional or worldwide environmental problems (all Article 191(1), TFEU) and the application of the precautionary and prevention principles (Article 191(2), TFEU).

Moreover, EU laws which prohibit whaling or trading in whale products, are all based on the Environmental Chapter of the Treaty (now Article 192, TFEU), rather than trade, commercial or fisheries policy. All the following instruments, for example have an environmental policy legal base:

- Regulation 348/81 establishing common rules for imports of whale products for non-commercial purposes (this would now be an environmental legal base, though it did not yet exist as a separate legal base at the time);²

² Regulation 348/81 was passed under Article 235 of the Treaty (now Article 352, TFEU) before there was a separate legal basis for environmental policy. At that time environmental laws were generally passed under Article 235. Now, this Regulation would be passed under Article 192, TFEU. The Regulation itself provides for qualified majority voting in the Council in relation to matters covered by it.

- the Habitats Directive 1992³ (specifically Article 12 (and Annex IV));
- the Wildlife Regulations⁴;
- the EU decisions concluding the Berne and the Bonn Conventions (would now be an environmental legal base, though it did not yet exist as a separate legal base at the time⁵).

This is further underlined by the fact that the EU's Common Position⁶ in relation to proposals for amendments to the International Whaling Convention and its Schedule was agreed by the Environment Council and has an environmental legal base⁷.

In addition, in the context of the IWC, the following points regarding competence are also relevant:

- Under Article 21(2)(f), TEU the Union's 'external action' covers international environmental measures, including measures relating to the sustainable management of global natural resources. However, this does not mean that the Union's competence is exclusive (see following bullet points).
- Protocol 25 of the Lisbon Treaty⁸ specifically states that when acting in an area for which the Union and Member States share competence, 'when the Union has taken action ..., the scope of the Union's exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area'.⁹
- As it is not a signatory of the Convention or an IWC member, the EU is not bound by the Convention or its Schedule and the Convention and Schedule are not automatically part of EU law. Consequently, changes to the Convention and its Schedule will not directly affect EU law, and will therefore remain within Member States' competence. This is subject to the caveat that it is not possible for EU Member States to support measures that would be weaker than existing EU law requirements.
- Article 191(4) introduces an additional layer of Member State competence in relation to international environmental negotiations and agreements by making Union competence relating to international cooperation and agreements on the environment '**without prejudice to Member States competence to negotiate in international bodies and to conclude international agreements.**'

³ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

⁴ Council Regulation 338/97/EC of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein (implementing CITES in the EU) and related regulations.

⁵ The Berne Convention 1979 on the conservation of European wildlife and natural habitats, concluded by Decision 82/72/EEC. The Bonn Convention 1979 on the conservation of migratory species of wild animals, concluded by Decision 82/461/EC. Both were passed under Article 235, TEC, see footnote 1 above.

⁶ EU Council Decision 7146/09 of 3 March 2009.

⁷ See Recital 1.

⁸ Protocol (No 25) on the exercise of shared competence (2007).

⁹ See Article 51, TEU.

This means that Member States have competence to negotiate and vote in the IWC context. Unlike situations where the EU has exclusive competence, there is no automatic requirement to abstain in votes if there is no Common Position. However Member States still have to comply with their general EU law obligations. They could never vote for provisions which would weaken EU environmental law, and should vote for proposals which would support or strengthen EU environmental principles.

3. The principle of sincere/loyal cooperation

Both the **principle of sincere cooperation** and the **requirement of unity in the international representation of the EU** are general principles of EU law.

EU case law in relation to the principle of sincere cooperation establishes a rule which imposes 'if not a duty of abstention, at least a duty of close cooperation'¹⁰, where there is a concerted EU strategy¹¹ in a particular area. This generally consists of a Council decision that authorises the Commission to negotiate or conclude international agreements and which sets clear legal standards.¹²

This case law does not directly translate into the IWC context because the EU is not a member of the IWC and the Commission is not the EU's negotiating body in this context. However, it could be argued that the 2009 Common Position is capable of constituting something similar to the type of concerted EU strategy referred to in the case law. The question is then how exactly the principle of sincere cooperation applies to the Common Position.

In this context, it is important to examine the purpose of the principle of cooperation as set out in the Treaty:

- Under Article 4(3), TEU **the Union and Member States** must 'pursuant to the principle of sincere cooperation' and 'in full mutual respect, assist each other in carrying out tasks which flow from the Treaties'. Member States must also:
 - take appropriate measures to **ensure fulfilment of EU law obligations;**
 - take appropriate measures to **ensure fulfilment of obligations resulting from acts of EU institutions;**
 - facilitate the **achievement of the Union's tasks;** and
 - refrain from any measures which could jeopardise the attainment of the Union's objectives.
- Under Article 24(3), TEU, in order to support the Union's 'external ... policy' Member States and the EU institutions must **cooperate in a spirit of mutual solidarity.**
- Under Article 13(2), TEU, the '**institutions shall practise mutual sincere cooperation**' and 'shall act within the limits' of EU law.

¹⁰Case C-246/07 *Commission v Sweden*, at para 58-60.

¹¹ Case 25/94 *Commission v Council*, at para 49 and Case C- 256/07 *Commission v Sweden* at para 9.

¹² The principle of cooperation is established in ECJ Ruling 1/78, paragraphs 34, 35 and 36, Opinion 2/91, paragraph 36, and Opinion 1/94, paragraph 108, Opinion 2/00, paragraph 18.

- Under Article 21(3), it **the Union** itself is under a duty to 'ensure consistency between the different areas of its external action and between these and its other policies.'

Therefore, though the principle of sincere cooperation undoubtedly applies in the context of the International Whaling Convention, it is important to bear the following points in mind:

- The principle of sincere cooperation imposes obligations to fulfil and conform with EU law obligations. Acting to weaken EU law and jeopardising the attainment of the Union's objectives is contrary to the principle of sincere cooperation. Any position taken in relation to the IWC proposals in June therefore needs to comply with EU environmental policy in general (and the Common Position in particular).
- The principle of sincere cooperation is 'an obligation of conduct, not an obligation of result'¹³, which cannot override obligations flowing from basic Treaty law, for example as regards shared/exclusive competence, or voting rules or the special nature of EU environmental law through the application of Article 193, TFEU. The principle cannot be used to require Member States to abstain on a vote that is subject to shared competence and has been decided by qualified majority voting.
- The principle of sincere cooperation applies not only to Member States, but also to EU institutions, i.e. the Commission and the Council. In their advice the Commission and the Council are therefore also under an obligation to ensure compliance with EU environmental law and policy and the conditions of the Common Position and not to jeopardise the attainment of the Union's objectives with regard to the protection of whales.

The real issue therefore becomes whether the conditions set in the Common Position and the requirements of EU environmental law are met by the proposals that are to be made in the IWC's next annual meeting in June.

4. Rules on voting

The Treaty does not deal directly with the situation faced by the EU and its Member States in relation to the International Whaling Convention, i.e. where there is an existing international environmental agreement of which EU Member States are parties and the EU itself is not, and which falls within an area of shared competence. Instead, the provisions in the Treaty dealing with voting rules in relation to international treaties generally deal with the situation where the EU is negotiating and concluding international agreements (even in cases of shared competence).

Therefore, it is necessary to examine some of the general voting rules which would generally apply in the context of rules on whaling. All of the relevant rules provide for qualified majority voting:

¹³ See para 28, p. 6 of George-Dian Balan, *The Common Commercial Policy under the Lisbon Treaty*, Jean Monnet seminar, Advanced Issues of European Law, 6th Session, April 20-27, 2007, Dubrovnik, Re-thinking the European Constitution in an Enlarged European Union.

- Council proceedings in general - see Article 16(3), TEU: qualified majority voting unless otherwise provided for by the Treaties;
- environmental policy under the Environment Chapter of the Treaty – see Article 192, TFEU – qualified majority voting within the ordinary legislative procedure;
- the negotiation and conclusion of environmental treaties by the EU - see Article 218, TFEU – qualified majority voting unless unanimity is required internally, which it is not in the context of whaling.

Just because many of the issues dealt with in this briefing do not involve the conclusion of agreements, but merely changes to rules under existing international Conventions, does not mean that the required voting rules in the particular area of Union policy would or should suddenly change to voting by unanimity.

There is therefore no legal basis in the Treaty for a rule which requires Member States to abstain in a decision in an international agreement if there is no unanimity regarding the EU's Common Position (or other agreed EU position).

Moreover, in relation to environmental agreements, there is an argument that Member States may even vote for more stringent environmental protection measures than those reflected in the Common Position (or other agreed EU position). This is because the provisions of the Environment Chapter in the Treaty form a *lex specialis* which allows Member States to pass more stringent protective measures (Article 193, TFEU, combined with Article 191(4), TFEU in relation to the international context). This is further made possible by the fact that the EU is not a member of the IWC and any proposed (more stringent) measure will not bind the EU.¹⁴

5. The right to obtain the opinion of the Court of Justice

It should also be noted that it is open to Member States (as well as the Commission, the European Parliament and, indeed, the Council) to obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties.

Where the opinion of the Court of Justice is adverse, the agreement may not enter into force unless it is amended or the Treaties are revised (see Article 218(11), TFEU). By extension, this article should also be available in relation to changes/amendments to rules of international conventions, for example where a Member State thinks that the change will lead to a breach of EU environmental law and policy.

6. The position of Denmark

It should also be noted that Denmark's justification which previously exempted it from having to comply with the EU Common Position (see Annex II of Common Position), is no longer valid, as this exemption was based on Declaration no. 25 annexed to the Final Act of the Maastricht Treaty. However, Declaration 25 is not annexed to the Lisbon Treaty, and therefore is no longer valid.

¹⁴ This distinguishes this case from the situation of Sweden in C-246/07 *Commission v Sweden*, at para 102.

The Lisbon Treaty is very specific in setting out how the provisions of the new Treaty amend the old TEU. Many of the old declarations annexed to the Maastricht Treaty are now clearly no longer relevant, and many are specifically dealt with by provisions in the Treaty itself. It is not possible to argue that some of the declarations have been replaced by Treaty provisions, but others have not. This means that all of these declarations have been superseded. This is confirmed by the fact that in relation to the protocols attached to the Lisbon Treaty, old protocols that already existed under the Maastricht Treaty have in fact been re-annexed to the Lisbon Treaty (for example what is now Protocol 17 on Denmark) and, where necessary, amended to reflect the change from a European Community to a European Union (a change specifically and expressly made in relation to all relevant provisions throughout the TEU, the TFEU and the Protocols).

All of this shows clearly that there is no intention for the old Maastricht Treaty declarations still to apply. Had this been the intention, they would have been re-annexed with the necessary amendments to their wording.

In any case, it should be noted that the declarations annexed to the Treaty are not binding in their effect.

Therefore, Denmark is now not only under a duty to vote in accordance with the Common Position on whaling, but if Denmark's proposal in relation to the Greenland humpback quota still stands, and it does not fulfil the conditions of the Common Position and EU environmental law, then Denmark's proposal would bring Denmark into conflict with EU law.

7. Conclusion

The above legal analysis makes clear that:

1. The reform proposals in the context of the IWC are a matter of environmental policy subject to shared competence, in relation to which the Member States have a right to vote.
2. Member States must ensure that the conditions set by the 2009 Common Position and the general requirements of EU environmental law are satisfied by any (reform) proposal submitted, as a matter of general EU law, but also under the principle of sincere cooperation. They cannot vote for a proposal that would weaken EU environmental law.
3. The EU is also subject to the principle of sincere cooperation and cannot require Member States to support a proposal that is not in conformity with EU environmental law requirements or, for that matter, to abstain from casting a negative vote.
4. The EU has no right to impose a rule requiring Member States to abstain in a vote in the IWC, even if there is no unanimously agreed position.

Therefore, the fundamental question that will determine how EU Member States can (and should) vote will be whether the IWC reform proposals (and any separate proposal for an

indigenous subsistence whaling quota for Greenland in relation to humpback whales) comply with EU environmental law requirements and whether they meet the conditions set out in the Common Position.

In this context the following considerations will be relevant:

The 2009 Common Position imposes high-level environmental requirements, which need to be satisfied by the reform proposals:

- The moratorium on commercial whaling in the Schedule is to be supported.
- Any new types of whaling are to be opposed, unless they involve only local consumption, foresee a role for IWC scientific advice and they 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).
- The creation of whale sanctuaries is to be supported.
- Indigenous (aboriginal) subsistence whaling is to be supported, but only if the conservation of the relevant stocks is not compromised taking into consideration the precautionary principle and scientific advice, if whaling operations are properly regulated and catches remain sustainable within the scope of subsistence needs for local use.

As well as having to meet these conditions, the reform proposal (and other possible proposals) will also need to comply with the general environmental obligations under EU law already set out (including EU Treaty obligations, international law obligations under the Bonn and Berne Conventions which are also binding EU law¹⁵, and provisions of EU secondary legislation such as the Habitats Directive).

It could even be argued that the 'acquis communautaire' on the protection of whales, including the Bonn Convention, which applies internationally (not just in EU waters), actually amounts to the true concerted EU strategy or agreed/common position in relation to the protection of whales and it is the Member States' and EU institutions' duty to support this position.

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¹⁵ The fact that the EU is a signatory of both the Berne and particularly also the Bonn Conventions (which goes beyond the EU in its effects) means that these international agreements are now an integral part of EU law and therefore binding on the EU and its Member States, irrespective of whether or not there is implementing legislation (see Article 216(2), TFEU)).