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Legal guide: EU law requirements applying to EU Member States voting on IWC Proposed Consensus Decision

Issue 1: Complying with EU law

(Including, Article 191, TFEU, the EU Habitats Directive 1992, the 1979 Berne and Bonn Conventions and the 2009 Common Position)

Member States must consider whether the IWC Proposed Consensus Decision (possibly as amended as a result of IWC negotiations) **satisfies EU law requirements** (including conditions set out in the 2009 Common Position).

In particular they must consider:

- 1. Will there be a continued moratorium on commercial whaling?**
- 2. Are the scientific and conservation requirements set in Common Position met?**
- 3. Is the prohibition of all intentional killing of whales in the Habitats Directive breached (without valid derogation)?**

A detailed analysis of all the relevant EU law requirements and of each of these questions and is included in ClientEarth briefing *The IWC Proposed Consensus Decision and EU law duties regarding whales*.¹

Conclusion 1	
If EU law/2009 Common Position requirements are not met:	If EU law/2009 Common Position requirements are met:
EU law generally, and the 2009 Common Position specifically, dictate that EU Member States cannot support Proposed Consensus Decision. To avoid national breaches of EU law, EU Member States must vote against the Proposed Consensus Decision , as the amended Convention and Schedule will affect national laws (but not EU law itself as the EU is not a signatory).	The 2009 Common Position and EU law conditions have been satisfied, and EU Member States can vote in favour of the Proposed Consensus Decision. There are no further EU law consequences.

¹ <http://www.clientearth.org/reports/marine-protection-clientearth-briefing-whaling-and-eu-law>

Issue 2: Unanimity and abstention

(Is there a requirement for Member States to agree a position unanimously before being entitled to vote, or are they required to abstain from voting if there is no unanimity?)

Relevant considerations:

Where EU Member States make a decision to agree a common course of action in relation to international environmental matters (whether by Common Position or less formally), the Treaty of Lisbon requires those decisions to be made by (qualified) majority voting. This would also be the case for fisheries measures. The issue of competence would have no influence on this.

A detailed analysis of the legal voting positions of EU Member States (and decision making in environmental and fisheries matters, as well as a detailed discussion of competence) is contained in ClientEarth briefing *The proposed reform of the International Whaling Convention and EU voting rules*.²

Conclusion 2

Where a **(qualified) majority of Member States supports an agreed position that secures compliance with EU law** (including, in this case, the conditions set out in the 2009 Common Position), this is sufficient to establish the EU's negotiating position in international agreements and **all EU Member States must vote accordingly**.

There is no need for unanimity.

Therefore, there can be no requirement for EU Member States to abstain on the basis that a minority of Member States disagrees. On the contrary, the disagreeing minority of EU Member States must vote with the majority or risk infringement proceedings for breaches of EU law.

² <http://www.clientearth.org/reports/100520-marine-protection-eu-voting-and-iwc-f.pdf>

Issue 3: What happens if EU Member States cannot agree a position by (qualified) majority voting?

Relevant considerations:

1. Shared and exclusive competence

Different rules apply in relation to areas of exclusive EU competence and of shared competence between the EU and its Member States.

Areas of shared EU and Member State competence include issues relating to environmental conservation (see Article 4(2)(e), TFEU) and general fisheries management measures (see Article 4(2)(d), TFEU).

Areas of exclusive EU competence include international agreements that may affect EU law (the common rules – see Article 3(2), TFEU) and issues relating to the 'conservation of marine biological resources under the Common Fisheries Policy' (see Article 3(1)(d), TFEU).

Where a measure simultaneously pursues two objectives, e.g. environmental protection and the conservation of marine biological resources under the Common Fisheries Policy (the CFP), those measures must be based on the legal basis that corresponds to the **main or predominant purpose** of the measure. Only if a measure has different objectives that are inextricably linked, without one being secondary and indirect in relation to the other, may a measure be founded on multiple corresponding legal bases.³

2. What is purpose of EU rules on the protection and conservation of whales?

It has been argued, including, we understand, by the Council's and European Commission's Legal Services, that EU laws on the conservation of whales should be subject to exclusive EU competence because this is a matter falling within Article 3(1)(d), TFEU, i.e. the conservation of marine biological resources under the CFP. Article 3(1)(d) is the legal basis for measures aimed at securing (conserving) the ongoing commercial exploitation of a particular 'available and accessible' marine aquatic species⁴, i.e. the exploitation of fish stocks and other marine harvestable resources. It is not intended to address marine conservation in general or the conservation of marine species for the purposes of biodiversity conservation.

³ See e.g. , Case C-300/89 *Commission v Council* [1991] ECR I-2867 (the *Titanium Dioxide Case*) at para 10 and 22, Case C-336/00 *Republik Österreich v Martin Huber* [2002] ECR I-7699 (*Huber*) at para 31 and 33, Case C-405/92 *Etablissements Armand Mondiet SA v Armement Islais SARL* [1993] ECR I-6133 (*Mondiet*), at para 27 and 28

⁴ See definition of 'living aquatic resources' in Article 3 of Regulation (EC) No 2371/2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (the 'CFP Regulation').

An approach that argues that EU law relating to whales is, or should be, a fisheries conservation measure under the CFP aimed at conserving whales as a harvestable resource, completely disregards the entire history of EU legislation on whales which is entirely based on considerations relating to environmental protection and biodiversity conservation. This is supported by the fact that, for example, the 2009 Common Position was agreed by the Environment Council rather than the Fisheries Council.⁵ Moreover, whales are not 'available and accessible' marine aquatic species for the purposes of fisheries. They are not commercially exploited, precisely because they are subject to EU environmental legislation which prohibits all killing and indeed trading of whales and whale products (not just through commercial exploitation).⁶

One example (as opposed to the long list of EU environment based measures relating to whales and cetaceans – see above and previous ClientEarth briefings already referred to) has been cited as evidence of cetaceans generally being a matter for fisheries conservation legislation. The agreement in question is the misleadingly named 'Agreement on the International Dolphin Conservation Programme', which is implemented in the EU in Council Decision 2005/938/EC. However, this agreement aims to prevent bycatch of juvenile yellowfin tuna and non-target species, as well as turtles and dolphins, in relation to Pacific yellowfin tuna fisheries. Therefore, the key reason that this Decision has a fisheries rather than an environmental legal base, is very clearly that the primary purpose of the measure is not to protect dolphins, but to regulate fisheries management and conserve yellowfin tuna stocks.

3. Whales as 'live animals'

The only justification claimed for whale conservation to fall under for Article 3(1)(d), TFEU appears to be that whales are cetaceans, which are 'live animals' under Annex I to the Treaty (except for one fisheries related international agreement which includes provisions on the prevention of dolphin bycatch – see below).

According to Article 38(3), TFEU, the products which are subject to the Common Agricultural Policy (the CAP) and the CFP are listed in Annex I of the Treaty. Chapter 1 of Annex I refers to 'live animals' and cross-refers to the Chapter in which live animals can be found in the 'Brussels Nomenclature' (now the 'Combined Nomenclature').⁷ The Combined Nomenclature contains the EU's regulation on tariffs and trade statistics of products which can be subject to import or export duties if they are imported into or exported from the EU.

⁵ Indeed attempts by the Commission to include a fisheries legal base for the Common Position have been specifically excluded several times. See Commission Statement attached to the Common Position.

⁶ For more details explaining why the protection of whales in the EU is an environmental policy matter, see previous ClientEarth briefings on EU voting rules and EU law duties relating to IWC negotiations already referred to – see footnotes 1 and 2.

⁷ Annexed to Regulation 1031/2008 of 19 September 2008 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.

Part 2 of the Combined Nomenclature (and previously the Brussels Nomenclature), the Schedule of Customs Duties, contains a list of live animals subject to customs duties. This list is all-encompassing. It lists some categories (mainly farmed animals and pets) more specifically, but it does potentially include **all live animals**, including whales and cetaceans, but also primates, birds, several general cover-all categories of 'others', which according to Commission guidance include lions, tigers, rhinoceroses, hippopotami, elephants, squirrels, foxes, marmots, beavers, otters, frogs, butterflies, beetles and other insects, etc.⁸

The extensive nature of this list shows that it cannot possibly be the intention of the legislator that the reference in Article 38(3), TFEU to the products listed in Annex I of the Treaty should cover **all** the animals enumerated in this Chapter of the Regulation containing the Combined Nomenclature. If this were the case, then all animals would be subject to the CAP and the CFP, and no animals could ever be subject to environmental legislation (for example the Wild Birds Directive or the Habitats Directive), as they would always be covered by the Combined Nomenclature list which the CFP and the CAP refer to.

The impossibility of this assertion is further underlined by the fact that the original Regulation on which the Combined Nomenclature is based has four different legal bases: relating to the Customs Union, the Common Commercial Policy, the Common Market, as well as the CAP.⁹ In fact, the list is based on international measures for categorizing products and is intended to cover products falling within all these policy areas and not just the CAP/CFP. Not every product that is listed in a particular chapter of the nomenclature (here Chapter 1) will automatically be a product governed by each and every policy area. Conversely the fact that a particular policy area, such as the CAP and CFP, is relevant for some products within a chapter does not mean all products in that chapter must, by extension, fall within the same policy area.

⁸ See Explanatory Notes to the Combined Nomenclature of the European Communities (2008/C 133/01).

⁹ See Recital 1 of Regulation 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff: Articles 28, 43, 113 and 235, TEC.

Conclusion 3: In the absence of an agreed position on the IWC Proposed Consensus Decision (as amended as a result of IWC negotiations):

The purpose of EU legislation on whales is linked to environmental protection and biodiversity conservation, as witnessed by the fact that all of the following have an environmental legal base (or would have had, had it existed at the time), or have environmental/biodiversity conservation goals:

- the Common Position 2009;
- Regulation 348/81 establishing common rules for imports of whale products for non-commercial purposes;¹⁰
- the Habitats Directive 1992¹¹ (specifically Article 12 (and Annex IV));
- the Wildlife Regulations¹²;
- 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 time¹³)

This means EU legislation on whales is subject to the EU Environmental Chapter and is subject to **shared competence** between the EU and its Member States.

Member States must try to use **their best endeavours to find agreement** and they must consult and cooperate.

EU Member States may act independently in order to ensure compliance with EU law and prevent jeopardising the attainment of the Union's objectives.

Notes:

Article 218(9), TFEU cannot apply to changes to the International Whaling Convention and its Schedule, as

- (i) the EU is not a member of the International Whaling Commission or a signatory of the Convention; and**
- (ii) any changes to the Convention or the Schedule will not have any direct effect on EU law.**

ClientEarth, 15 June 2010

¹⁰ 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.

¹¹ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive).

¹² 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.

¹³The 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.

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