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2020/0354 (NLE)

Proposal for a

COUNCIL DECISION

on the position to be taken on behalf of the European Union at meetings of the Parties to the Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

EXPLANATORY MEMORANDUM

1. SUBJECT MATTER OF THE PROPOSAL

This proposal concerns the decision establishing the position to be taken on the Union's behalf at meetings of the Parties to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

2. CONTEXT OF THE PROPOSAL

2.1. The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing

The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing ('the Agreement') is the first binding international agreement to specifically target Illegal Unreported and Unregulated (IUU) fishing.

Its main objective is to prevent, deter and eliminate IUU fishing by preventing vessels engaged in IUU fishing from using ports and introducing their catches into the markets. In this way, the Agreement reduces the incentive of such vessels to continue to operate while it also blocks fishery products derived from IUU fishing from reaching national and international markets. The effective implementation of the Agreement ultimately contributes to the long-term conservation and sustainable use of living marine resources and marine ecosystems. The provisions of the Agreement apply to fishing vessels seeking entry into a port of a State which is different to their flag State.

The Agreement has been negotiated in the framework of the Food and Agriculture Organisation (FAO), of which the European Union is a member. It was approved by the FAO Conference at its Thirty-sixth Session on 22 November 2009, through Resolution N° 12/2009, under Article XIV, paragraph 1 of the FAO Constitution. It entered into force on 5 June 2016 and has now[1] 67 Parties.

The European Union was among the first to become a party to the Agreement[2], in 2011.

2.2. The meeting of the Parties

The meeting of the Parties is the decision-making body under the Agreement, which shall meet every two years or more frequently if it so decides[3].

Article 24 paragraph 2 of the Agreement also provides that, four years after the entry into force of the Agreement, FAO shall convene a meeting of the Parties to review and assess the effectiveness of this Agreement in achieving its objective[4]. The Parties shall then decide on further such meetings as necessary.

Special meetings of the Parties can also be held at such other times as may be deemed necessary by the Parties, or at the written request of any Party[5].

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1 October 2020; http://www.fao.org/port-state-measures/background/parties-psma/en/

2 Council Decision (EU) 2011/443 of 20 June 2011 on the approval, on behalf of the European Union, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (OJ L 191, 22.7.2011, p. 1).

3 Rule 5.1 of the Rules of Procedure for the Meetings of the Parties.

4 This meeting, to be hosted by the EU, should have been held in 2020 but has been postponed to 2021 due to COVID-19.

5 Rule 5.2. of the Rules of Procedure for the Meetings of the Parties.

2.3. Decisions by the meeting of the Parties

The meeting of the Parties has the authority to adopt measures to prevent, deter and eliminate illegal, unreported and unregulated fishing and these are binding on the contracting parties.

In principle, the Parties take decisions on substance by consensus but, where the Chairperson determines that all efforts to reach consensus have been exhausted, the decision shall be taken by a simple majority of the votes cast[6].

Amendments to the Rules of Procedure for the Meetings of the Parties may be adopted by consensus and, if consensus cannot be achieved, the decision shall be taken by a two-thirds majority of the votes cast, provided that such majority is more than half of all the Parties[7]. The Union has participation and voting rights.

3. POSITION TO BE TAKEN ON THE UNION'S BEHALF

It is proposed that the position to be adopted on behalf of the Union at the meetings of the Parties is established according to a two-tier approach. A Council Decision will set out the guiding principles and orientations of the Union's position on a multiannual basis, and it is subsequently adjusted for each meeting by Commission non-papers to be discussed in the Council Working Party.

This approach is currently also taken in regional fisheries management organisations (RFMOs) and the position that is to be taken on behalf of the Union in those meetings.

The present decision incorporates the principles and orientations of the common fisheries policy (CFP) as laid down in Regulation (EU) No 1380/2013 of the European Parliament and of the Council[8] and is guided by the Community system to prevent, deter and eliminate illegal, unreported and unregulated fishing established by Regulation (EC) No 1005/2008. It takes into account the provisions of the Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the CFP[9], Council Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets[10], Council Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures[11] and Commission Implementing Regulation (EU) 404/2011 laying down detailed rules for the implementation of Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy[12].

This decision also takes into consideration the international commitments of the EU under the United Nations Convention on the Law of the Sea of 10 December 1982 (UNCLOS), the United Nations Agreement relating to the Conservation and Management of Straddling Fish

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6 Rules 7.2. and 7.3. of the Rules of Procedure for the Meetings of the Parties.
Rule XVII.3(a) General Rules of the Organisation.

7 Rule 13 of the Rules of Procedure for the Meetings of the Parties.

8 Regulation (EU) No 1380/2013 of the European Parliament and of the Council 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).

9 OJ L 343, 22.12.2009, p. 1.

10 OJ L 347, 28.12.2017, p. 81.

11 OJ L 198, 25.7.2019, p. 105.

12 OJ L 112, 30.4.2011, p. 1.

Stocks and Highly Migratory Fish Stocks of 4 August 1995 (UN Fish Stocks Agreement), the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas of 24 November 1993 of the Food and Agriculture Organization of the United Nations (FAO Compliance Agreement), as well as other relevant multilateral and bilateral agreements.

This decision reflects the objectives set in the Commission Communication on the external dimension of the CFP[13] and the related Council conclusions, the Council conclusions on Oceans and Seas[14], the Council conclusions[15] on the Joint communication by the High Representative of the Union for Foreign Affairs and Security Policy and the Commission on 'International ocean governance: an agenda for the future of oceans'[16], including in relation to cooperation with third countries for the implementation of the Port State Measures Agreement. It also considers the IUU fishing aspects of the EU Maritime Security Strategy[17] and its revised implementing Action Plan[18].

Finally, it is inspired by the Commission's statement in its Communication on The Green Deal[19] that it would take a zero-tolerance approach to illegal, unreported and unregulated fishing, an objective that was then reaffirmed in the two Commission Communications on an "EU Strategy Biodiversity Strategy for 2030"[20] and "A Farm to Fork for a Fair, Healthy and Environmental-Friendly Food System"[21].

4. LEGAL BASIS

4.1. Procedural legal basis

4.1.1. Principles

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'.

'Acts having legal effects' include acts that have legal effects by virtue of the rules of international law governing the body in question. It also includes instruments that do not have a binding effect under international law, but that are 'capable of decisively influencing the content of the legislation adopted by the EU legislature'[22].

4.1.2. Application to the present case

The meeting of the Parties is a body set up by an agreement, namely the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing.

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13 COM (2011) 424, 13.7.2011.
14 14249/19, 19.11.2019.
15 7348/1/17 REV 1, 24.3.2017.
16 JOIN (2016) 49 final, 10.11.2016.
17 Doc. 11205/14 of the Council of the European Union, 24.06.2014
18 Doc. 10494/18 of the Council of the European Union, 26.06.2018
19 COM (2019) 640 final, 11.12.2019.
20 COM (2020) 380 final, 20.05.2020.
21 COM (2020) 381 final, 20.05.2020.
22 Judgment of the Court of Justice of 7 October 2014, *Germany v Council*, C-399/12, ECLI:EU:C:2014:2258, paragraphs 61 to 64.

The acts which the meeting of the Parties is called upon to adopt constitute acts having legal effects. The envisaged acts of the meeting of the Parties will be binding under international law and are capable of decisively influencing the content of EU legislation, namely:

- Council Regulation (EC) 1005/2008 establishing a Community system to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing[23];
- Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the CFP[24];
- Council Regulation (EU) 2017/2403 of the European Parliament and of the Council of 12 December 2017 on the sustainable management of external fishing fleets[25];
- Council Regulation (EU) 2019/1241 of the European Parliament and of the Council of 20 June 2019 on the conservation of fisheries resources and the protection of marine ecosystems through technical measures[26];
- Commission Implementing Regulation (EU) 404/2011 laying down detailed rules for the implementation of Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy[27].

However, the envisaged acts do not supplement or amend the institutional framework of the Agreement.

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

4.2. Substantive legal basis

4.2.1. Principles

The substantive legal basis for a decision under Article 218(9) TFEU depends primarily on the objective and content of the envisaged act in respect of which a position is taken on the Union's behalf. If the envisaged act pursues two aims or has two components and if one of those aims or components is identifiable as the main one, whereas the other is merely incidental, the decision under Article 218(9) TFEU must be founded on a single substantive legal basis, namely that required by the main or predominant aim or component.

4.2.2. Application to the present case

The main objective and content of the envisaged acts relate to fisheries. Regulation (EU) No 1380/2013 is the legal basis setting out the principles to be reflected in this position.

Therefore, the substantive legal basis of the proposed Decision is Article 43(2) TFEU.

4.3. Conclusion

The legal basis of the proposed decision should be Article 43(2) TFEU, in conjunction with Article 218(9) TFEU.

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23 OJ L 286, 29.10.2008, p. 1.
24 OJ L 343, 22.12.2009, p. 1.
25 OJ L 347, 28.12.2017, p. 81.
26 OJ L 198, 25.7.2019, p. 105.
27 OJ L 112, 30.4.2011, p. 1.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 43(2), in conjunction with Article 218(9) thereof,

Having regard to the proposal from the European Commission,

Whereas:

(1) The Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (the 'Agreement'), negotiated under the aegis of the Food and Agriculture Organisation (FAO), of which the Union is a Member, was approved by the Union by Council Decision (EU) 2011/443[1]. The Agreement has entered into force on 5 June 2016.

(2) The meeting of the Parties is the decision-making body under the Agreement and has the authority to adopt measures to prevent, deter and eliminate illegal, unreported and unregulated fishing that are binding on the Parties. It shall meet every two years or more frequently if it so decides.

(3) Article 24 paragraph 2 of the Agreement also provides that, four years after the entry into force of the Agreement, FAO shall convene a meeting of the Parties to review and assess the effectiveness of the Agreement in achieving its objective. The Parties shall then decide on further such meetings as necessary. Special meetings of the Parties can also be held at such other times as may be deemed necessary by the Parties, or at the written request of any Party.

(4) It is appropriate to establish the position to be taken on the Union's behalf in the meeting of the Parties to the Agreement for the first review meeting of the Agreement[2] as set out in its Article 24(2) of the Agreement, and the three subsequent biennial meetings of the Parties and any related inter-sessional meetings in that regard as from the adoption of the current position, as measures under the Agreement will be binding on the Union and capable of decisively influencing the content of Union law, namely, Council Regulations (EC) No 1005/2008[3] and (EC) No 1224/2009[4], Regulation (EU) 2017/2403[5] of the European Parliament and of the Council and Commission

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1 Council Decision (EU) 2011/443 of 20 June 2011 on the approval, on behalf of the European Union, of the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (OJ L 191, 22.7.2011, p. 1).

2 Currently planned from 31st May to 4th June 2021.

3 OJ L 286, 29.10.2008, p. 1.

4 OJ L 343, 22.12.2009, p. 1.

5 OJ L 347, 28.12.2017, p. 81.

Implementing Regulation (EU) 404/2011 laying down detailed rules for the implementation of Council Regulation (EC) 1224/2009 establishing a Community control system for ensuring compliance with the rules of the Common Fisheries Policy[6].

(5) In view of the need for the position of the Union to take account of new developments, based on relevant information presented before or during the meetings of the Parties, procedures should also be established, in line with the principle of sincere cooperation among the Union institutions enshrined in Article 13(2) of the Treaty on European Union, for the year-to year specification of the Union's position for the first review meeting of the Agreement as set out in its Article 24 paragraph 2 as well as the three subsequent biennial meetings of the Parties and any related intersessional meetings.

(6) The main objective of the Agreement is to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing by preventing vessels engaged in IUU fishing from using ports and introducing their catches into the markets. In this way, the Agreement reduces the incentive of such vessels to continue to operate while it also blocks fishery products derived from IUU fishing from reaching national and international markets.

(7) IUU fishing constitutes one of the most serious threats to the sustainable exploitation of living aquatic resources and jeopardies the very foundation of the Union Common Fisheries Policy and international efforts to promote better ocean governance.

(8) The meeting of the Parties to the Agreement is responsible for the adoption of measures designed to ensure the Agreement’s implementation, and thereby to ensure the long-term conservation and sustainable use of living marine resources and marine ecosystems. The Union should play an active, effective and constructive role in these meetings to ensure the implementation of the Agreement and foster international cooperation on IUU fishing.

HAS ADOPTED THE DECISION:

Article 1

The position to be taken on the Union's behalf in the meetings of the Parties to the Port State Measures Agreement to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing is set out in Annex I.

This position is established for the first review meeting of the Agreement as set out in its Article 24(2) as well as for the three subsequent biennial meetings of the Parties and any related inter-sessional meetings.

Article 2

The year-to-year specification of the Union's position to be taken in the meetings of the Parties to the Agreement mentioned in the second paragraph of Article 1 shall be conducted in accordance with Annex II.

[6] OJ L 112, 30.4.2011, p. 1.

Article 3

The Union's position set out in Annex I shall be assessed and, where appropriate, revised by the Council upon a proposal from the Commission, at the latest for the meeting of the Parties to the Agreement following the third biennial meeting referred to in the second paragraph of Article 1.

Article 4

This Decision is addressed to the Commission.

Done at Brussels,

For the Council
The President