UCLouvain
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To the members of the EU Experts Meeting on the Bern Convention

Concern : Proposal for a Council Decision on the position to be taken on behalf of the European Union on submitting proposals for amendment of Appendices II and III of the Convention on the Conservation of European wildlife and natural habitats with a view to the meeting of the Standing Committee of the Convention

Introduction

Following a presentation made on Wednesday 8 May 2024, the purpose of this note is to apprise the members of the EU experts on the Bern Convention of the requirements that a EU decision to grant a lower protection status to a strictly protected species must meet. These requirements are mainly stemming from general principles of European Union law, principles that must be respected by the EU institutions, whether for an act of internal law (amending an annex to the Habitats Directive) or a position taken at a conference of parties to a international agreement to which the EU is a party (the Bern Convention). Insofar as they have not been codified in nature conservation regulations, these requirements are essentially based on case law of the Court of Justice of the EU. The note does not deal with the institutional aspects of the Commission's proposal for a Council decision, as these aspects have already been addressed.

The note is written in a concise and clear manner so that it can be easily understood by civil servants who are not specialised in European Union law. It is therefore an exercise in clarification of complex legal issues. At the end of the note, reference is made to more specialised textbooks on the subject matter.

Finally, the author declares that he has received no instructions from any EU institution, government authority or vested interest.

Structure of the analysis

We will begin our analysis with a short summary of the EU legal hierarchy (1). We then address the obligation placed on the EU institutions to state the reasons underpinning their decisions (*primary law*) (2), which implies the recourse to an independent, high-level scientific expertise (*case law*) (3). Then, given that the status of the Wolf in Europe is the subject of scientific controversy, the legal scope of the precautionary principle (*primary law*) will be recalled in relation to the scientific expertise that is required (4). Furthermore, the decisions taken by the institutions of the European Union must comply with the general principle of proportionality (*primary law and case law*) (5). This raises the question of how to strike the balance between, on the one hand, the downgrading of a strictly protected species and, on the other hand, the maintenance of the strict regime currently in force (6).

1. The structure of the EU legal order

Before outlining the case law requirements, it is necessary to briefly summarize the different layers of European Union law. The legal system of the European Union (EU) is akin to a pyramid. At the top are the provisions of the founding treaties (TEU, TFEU, Euratom, Charter of Fundamental Rights, Protocols) and the general principles of law enunciated by the Courts of the European Union. All acts adopted by the EU institutions and by the Member States when they intervene in an area covered by EU law must abide to these higher-ranking norms.

EU law on biodiversity and nature protection derives thus mainly from three distinct normative sources.

- The provisions of **primary law**, i.e. those included in the Treaty on the functioning of the EU (TFEU), particularly those relating to sustainable development and the environment; these provisions are at the top of the EU legal order. These provisions have been supplemented by a series of general principles, such as proportionality, legal certainty, non-discrimination.

- The **international agreements** to which the EU and its Member States are parties in the areas of biodiversity and nature protection. As regards these conventions, they rank below primary law but above secondary legislation. This explains why the 1992 Habitats Directive must comply with the 1979 Bern Convention (a mixed agreement), which occupies a higher place in this normative hierarchy.

- The **secondary legislation** adopted on the basis of the various legal bases assigning specific policies (Article 192 TFEU regarding wildlife) to the EU lawmaker. These legislative acts (this is the case of the Habitats directive) do implement the TFEU obligations as well as the various obligations stemming from international nature protection agreements to which the EU and its member states are parties (eg Bern Convention).

2. Statement of reasons

According to settled case law, the statement of reasons required by Article 296 TFEU must be appropriate to the nature of the act in question and must clearly and unequivocally show the reasoning of the institution that issued the act, so as to enable the interested parties to know the justification for the measure taken and the competent court to exercise its review powers.

The requirement to state reasons must be assessed in the light of the circumstances of the case, in particular the content of the act, the nature of the reasons given and the interest that the addressees or other persons directly and individually concerned by the act may have in receiving explanations.

It is not required that the statement of reasons must specify all the relevant matters of fact and law, since the question whether the statement of reasons for an act satisfies the requirements of

Article 296 TFEU must be assessed in the light not only of its wording but also of its context and of all the legal rules governing the matter in question.[1]

While the institutions are not obliged, in the reasons given for the decisions which they adopt, to take a position on all the arguments which have been raised before them in the course of an administrative procedure, they must nevertheless set out the **facts** and **legal considerations** which are of essential importance to the scheme of their decisions.[2]

3. Level of scientific evidence required to state the reasons leading EU institutions to downgrade a strictly protected species

According to the case law of the CJEU on the statement of reasons, the EU institutions must reckon upon 'facts' enabling them to take the measure at hand. As far as nature protection measures are concerned, these factual data are scientific in nature.

Given that neither the Bern Convention nor the Habitats directive provide for a specific procedure for the downgrading of a strictly protected species, it is necessary to examine the scientific evidence required in the light of the case law of the courts of the EU.

It is settled case law that risk management decisions have to be based on:

- 'solid and convincing evidence', 3
- 'the most reliable scientific data available', [4]
- a 'sufficiently reliable and cogent information' allowing the authority to understand the ramifications of the scientific question raised.5

Regarding the conservation of Natura 2000 areas, the assessment conducted to assess the impacts of a plan or a project on the protected area 'may not have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed works on the protected area concerned'.[6]

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[1] CJEU, Joined Cases C-367/95 P *Commission v Sytraval and Brink's France* [1998] EU: C:1998:154, paragraph 63; see also Cases C-341/06 P and C-342/06 P *Chronopost and La Poste/UFEX e. a*., [2008] EU:C:2008:375, paragraph 88, and the case-law cited.

[2] Case C-413/06 P *Bertelsmann and Sony Corporation of America v Impala*, EU: C:2008:392, paragraph 169, and of 6 September 2012, *Storck v OHIM,* C-96/11 P, EU:C:2012:537, paragraph 21

[3] Case T-74/00 *Artegodan* [2006] T:2006:286**,** para 192.

[4] Case C-236/01 *Monsanto Agricoltura Italia* [2003] ECR I-8105, para 113; Case C-192/01 *Commission v. Denmark* para 51; Case C-616/17 *Blaise* [2019] C:2019:800, para 94; Case T-13/99 *Pfizer* [2002] ECR II-3305, paras 196-197.

[5] Case T-13/99 *Pfizer* [2002] ECR II-3305, para 162; Case T-70/99 *Alpharma* v *Council* [2002] T:2002:210, paras 173 to 176 ; Case T-257/07 *France* v *Commission* [2011] T:2011:444, para 77; see also, to that effect, Cases T-429/13 and T-451/13 *Bayer* (n 13) para 117.

[6] Case C-164/17 *Grace and Sweetman* [2018] C:2018:593, para 39 ; Case C-461/17 *Brian Holohan* [2018], para 34.

Moreover, risk management decisions must be backed up by the scientific data available at the time 'when the precautionary measure was taken'.7 References to the latest international research 8 as well as new evidence 9 on the subject enhance the quality of the decision.

The scientific experts must undertake their assessment in 'an independent, objective and transparent manner'. Accordingly, the competent public authority should entrust this task to scientific experts [10] who, on completion of the scientific process, provide it with scientific advice.[11]

In short, EU courts attach great importance to the scientific evidence justifying the adoption of a binding risk measure.

4. The precautionary principle

The precautionary principle enshrined in Article 191(2) TFEU, that reads as follows:

'Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle ….'.

This provision is drafted in such a way that the EU institutions and the Member States when they intervene in areas regulated by EU law are obliged to apply the precautionary principle when carrying out action in the environmental field.

The fact that the precautionary principle is not expressly enshrined in the Habitats Directive, i.e. a secondary law act, does not preclude its application to measures adopted under that directive. As explained above, the principle, enshrined in primary law (Article 191(2) TFEU), is binding on all acts of secondary legislation (e.g. the Habitats Directive). Indeed, in a number of nature conservation cases, the Court of Justice of the EU has justified a strict interpretation of the regimes at hand in referring to the precautionary principle.

The Court of justice of the EU (CJEU and the General Court of the EU) express the view that 'where it proves to be impossible to determine with certainty the existence or extent of the alleged risk because of the insufficiency, inconclusiveness or imprecision of the results of studies conducted, but the likelihood of real harm to public health persists should the risk materialise, the precautionary principle justifies the adoption of restrictive measures'.[12]

Regarding the conservation of Natura 2000 areas, the authorization of a plan or a project likely to undermine the conservation status of the site can only be granted where the appropriate scientific assessment demonstrates the absence of risks for the integrity of the site. 'Where doubt remains as to the absence of adverse effect on the integrity of the site', the Habitats Directive requires, in line with the precautionary principle, the competent authority to refrain

[7] Case T-13/99 *Pfizer* [2002] ECR II-3305, para 145
[8] Case C-236/01 *Monsanto*, above, para 113; Case C-192/01 *Commission v. Denmark* para 51; Case C-473/98 *Toolex* [2000] ECR, para 45; Cases C-154/04 and C-155/05 *Alliance for Natural Health* [2005] ECR I-06451, para 53.
[9] Case T-74/00 *Artegodan* [2006] T:2006:286**,** para 194.

[12] Case C-192/01 *Commission v Denmark,* para 52 ; Case C-343/09 *Afton* [2010], para 171.

from issuing the authorization. [13] In accordance with the logic of the precautionary principle, authorities can if need be, order additional investigations in order to remove the lingering uncertainty.[14]

Although the *Waddenzee* jurisprudence has been developed in the context of the conservation of Natura 2000 sites and the assessment of the derogations referred to in article 6, paragraph 3 of the directive, the same reasoning can be applied by analogy to the conservation of the species listed in the annex IV to the directive.

5. Principle of proportionality

In assessing the proportionality of the EU measure proposed, the institutions have to examine both its relevance (1st test) and its essential character (2nd test). Should these two requirements be fulfilled, a third test is required, an analysis of the measure itself, no longer through comparison with others, to determine whether the advantage provided as a matter of wildlife management is not disproportionate with regard to the impact the measure could have on wildlife in general.

- *First test: 'suitability' of the measure with regard to the objective pursued*

As one need not kill a fly with a sledgehammer, the measure proposed should not be excessive with regard to the problem. The principle of proportionality thus requires that the measure be adequate, suitable with a view to attaining its objective. This first stage is known as the *'suitability test'* or *'adequacy test'*.

The first question to answer is whether the facts noted by the institutions justify a need for a measure. Does the current situation or risks entailed by the protected species justify a modification of its status? In order to be deemed suitable, the measure at issue must be linked to the objective pursued (see the *Tapiola* case below on the hunting of wolves in Finland). It must constitute a reasonably intelligible means of ensuring the removal of a nuisance or a risk entailed by the protected species. In that respect, the coherence of the approach endorsed is at the essence of this first requirement.

- *Second test: control of the necessity of the measure aiming at downgrading the status of the protected species*

The principle of proportionality implies a comparison of measures likely to attain the desired result and the selection of the one with the least disadvantages. If it appears that an alternative measure would meet the target while hindering to a lesser degree the conservation aims pursued by the Habitats Directive, the contested measure is no longer necessary and must be deemed disproportionate. The national measure must therefore be necessary in attaining the objective pursued.

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[13] Case C-127/02 *Waddenzee* [2004] ECR I–7405, para 57. This interpretation has been confirmed in Case C-6/04 *Commission v UK* [2005] C:2005:626 ; Case C-98/03 *Commission v Germany* [2006] C:2006:3; Case C-418/04 *Commission v Ireland* [2007] C:2007:780; Case C-304/05 *Commission v Italy* [2007] C:2007:532; Case C-226/08 *Stadt Papenburg* [2010] C:2010:10 ; Case C- 239/04 *Commission v Portugal* [2010] C:2006:665; Case C-209/02 *Commission v Austria* [2010] C:2010:602 ; Case C-258/11 *Sweetman* [2013] C:2013:220, paras 41 to 43.

[14] Opinion of AG Kokott in Case C-127/02 *Waddenzee* [2004], paras 99-111.

There are many illustrations of the necessity test regarding waste management. A few cases will suffice.

- The prohibition to trade a species of macaw, a parrot found in the neotropic area and whose placing on the market is ruled by the CITES convention, is compatible with the TFEU 'only to the extent that it is necessary for effectively achieving the objective of the protection of the health and life of animals', an objective mentioned in Article 36 TFEU ([15]).
- The prohibition to import exotic crayfish on German territory must be proportionate to the aim pursued, the protection of indigenous crayfish ([16]).

- *Third test: proportionality stricto sensu of the measure*

Irrespective of the fact that the measure fulfilled the two first tests, the institutions have to weigh -although the case law is somewhat complex on this issue – the advantage of the contested measure with the impacts it might have on other interests.

Be that as it may, the second test (necessity) calls for the EU institutions to examine very carefully whether it is necessary to replace the regime currently in force, which does not provide for an absolute protection of the species, with a less protective regime. We address this point in a sixth section.

6. Strict protected status and scope of derogations

A derogation allowing the capture, or the killing of a strictly protected species must be based on Article 16(1) of the Habitats Directive. It must be applied appropriately to deal with precise requirements and specific situations.

Therefore, the derogation under Article 16(1) must fulfilled several conditions :
- to define its objectives in a clear and precise manner,[17]
- to be supported by scientific evidence,
- to provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative,[18]
- not to undermine the favourable conservation status of those populations in their natural range,[19]
- to ensure the long-term preservation of the dynamics and stability of the species in question.[20]

When the ability of the derogation granted under Article 16(1) to attain the pursued objective is surrounded by uncertainty, the national authority is obligated, on the basis of rigorous scientific data, to ascertain that the derogation proposed is 'actually capable' to achieve its goal. [21]

([15]) Case C-510/99 *Tridon* [2001] ECR I-7777, para. 53.
([16]) Case C-131/93 *Commission v. Germany* [1994] ECR I-3303.
[17] C-674/17 *Luonnonsuojeluyhdistys Tapiola* [2019] C:2019:851, para 41.
[18] Para. 49.
[19] Para 55.
[20] Paras 44 and 45.
[21] Para 57.

In accordance with the precautionary principle, a Member State must refrain from authorizing the killing of wolves where there is doubt as to whether or not such a derogation will be detrimental to the maintenance or restoration of populations of such an endangered species at a favourable conservation status.[22]

'if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation.'[23]

It follows that when facing lingering uncertainty regarding the impact of the derogation on the conservation status of the species listed in Annex IV, the State is obligated to renounce the derogation.

That obligation to provide a statement of reasons is not met when the derogation does not contain any reference to the absence of any other satisfactory solution or any reference to relevant technical, legal and scientific reports to that effect

The CJEU stressed that the grant of derogations to kill wolves by way of exception 'must be assessed also in the light of the precautionary principle'.[24]

The principle of proportionality obliges the EU institutions to examine, in light of the best scientific evidence, whether it is necessary to modify the protection status of the Wolf on the grounds that the current regime of derogations as interpreted by the CJEU does not allow the conservation objectives pursued to be achieved.

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[22] Para 69.
[23] Para 66.
[24] Para 69.