

**Brussels, 11 March 2024**

**WK 3545/2024 ADD 1**

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## **CONTRIBUTION**

From:	General Secretariat of the Council
To:	Working Party on International Environment Issues (Biodiversity)
N° Cion doc.:	14265/22 + ADD 1
Subject:	Subject: Bern Convention Council Decision: Comments from a delegation

Following the call for comments launched on 5 March 2024 (WK 3545/24), delegations will find attached comments by LU.

**Luxembourg, 11/3/2024**

*Questions to the Presidency and/or the Commission concerning the steering note on the 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*

In reaction to the Steering Note by the Presidency as published on the delegates portal on 5<sup>th</sup> of March (WK 3545/2024), Luxembourg believes that before engaging in the discussion of the proposed council decision (ST17071), it is necessary to first assess whether or not the proposal is admissible in the context of Article 191 TFEU. We would therefore appreciate a reaction by the Presidency and/or the Commission on the following questions.

### **Rationale**

Large mammals, their habitats and the ecosystems of which they are part, are generally in poor condition in the EU. The wolf is therefore included in the Habitats Directive on the list of Annex III: “animal and plant species of community interest whose conservation requires the designation of special areas of conservation”, Annex IV: “animal and plant species of community interest in need of strict protection”, and Annex V: “animal and plant species of community interest whose taking in the wild and exploitation may be subject to management measures”

The COM proposes the reduction of the international level of protection of the wolf through an EU proposed amendment to the Bern Convention. This would downgrade the protection of the Wolf under the Bern Convention in a matter that may not be compatible with its protection in the EU as foreseen by the Habitats Directive.

The actions of the Union and its Member States, including their external actions, are subject to EU law. Such a *prima facie* tension as put forward by the COM requires special motivation, in the light of the duty of care, the principle of good administration, and the precautionary principle.

### **Request for information**

The question therefore arises whether the proposal (COM responsibility) and its handling (PCDY & MS responsibility) are justified in the light of Article 191 TFEU, which includes:

- The Union's obligation to strive to preserve, protect and improve the quality of the environment;
- The obligation of the Union to promote at international level measures to deal with regional or global environmental problems;
- The obligation of the Union to aim for a high level of protection in its environmental policy; to rely on the precautionary principle and the principle of preventive action, the principle that environmental damage should be combated at source as a priority

Before engaging on the above mentioned proposal and in order to avoid any liability due to the non-compliance with EU law, it is important to establish beyond any doubt that the proposal (responsibility of COM) is:

- based on the best available scientific and technical data (Article 191 TFEU), and
  - that its treatment (responsibility of PCDY&MS) is compatible with the obligations of the EU-Member States under the Habitats Directive and the EU-treaties.
- ⇒ Can the Presidency, through the Commission and the Council Legal Service, prove that the proposal itself does not threaten to undermine the measures and obligations provided for therein, nor that it would give the impression that the measures and obligations could be undermined?
- ⇒ Is the proposal compatible with the obligation to achieve and maintain a favorable long-term conservation status for the wolf, for its habitat, and for the ecosystem of which it is part?
- ⇒ Has the latter been sufficiently established on the basis of the best available scientific knowledge, determined with due care, and taking into account the precautionary principle?

The proposal furthermore needs to be examined against its alignment with the principles of necessity and proportionality (COM, PCDY & MS responsibility) to avoid violations of foundational principles of primary EU legislation.

In line with Article 5(4) of the Treaty of the European Union “under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties [...]”. It should be noted that the Court of Justice of the European Union has - through several rulings - established proportionality as one of the general principles of EU law, applying directly also upon Member States.

Under this principle, EU measures should be:

- i) **suitable** to achieve the desired end;
- ii) **necessary** to achieve the desired end, and;
- iii) must not impose a burden on the individual that is excessive in relation to the objective sought to be achieved (**proportionality in the narrow sense**).

With regards to the **suitability** of the proposed measures, i.e. unilateral downlisting of the protection of the status of the wolf under the Bern Convention and subsequently under the Habitats Directive, it needs to be examined whether the downlisting of the wolf will lead to the achievement of the desired objective, namely the reduction of wolf attacks on livestock. The Commission’s in-depth analysis established that lethal control measures (which would be permitted under much looser terms through the downlisting of the wolf) “*reduced damage to livestock only when it was intense enough to reduce wolf populations over large areas*”. Such intensity in the reduction of wolf populations would only be allowed if the species were to be stripped from any protection status (even Appendix III) which is not proposed.

Furthermore, and according to the Parliament's findings (PETI Committee Study "Large Carnivore Management Plans of Protection: Best Practices in EU Member States"), "*lethal management has no or little effect and even counter-expected effects in minimizing wolf's livestock depredation*".

- ⇒ Given the lack of conclusive evidence in the Commission's in-depth analysis (which constitutes the only scientific underpinning of its proposal) and other available evidence, can the Commission provide a comprehensive analysis of how the proposed downlisting of the wolf from Appendix II to Appendix III is **suitable** in achieving its stated objective of reducing wolf attacks on livestock?

With regards to the **necessity** of the proposed measures in achieving the desired end, due consideration of potential less damaging alternatives need to be considered.

- ⇒ Can the Commission provide a science-based justification on the grounds why the adoption of other measures, in this case the combination of preventative co-existence measures alongside applicable State Aid Guidelines on compensation of the economic damage caused by protected species, is not prone to achieve the desired end, while impinging less upon the Union's obligation to achieve a high standard of environmental protection of Article 192 TFEU?

Furthermore, the Commission itself attests that "On a large scale, **the overall impact of wolves on livestock in the EU is very small**, but **at a local level**, the **pressure on rural communities can be high in certain areas**." In line with the Commission's own assessment, the impacts from the wolf presence are thus **local/limited**.

According to the principle of subsidiarity (TEU Art 5(3)) in cases of shared competence between the Union and Member States, the Union takes action only when the objectives of the proposed action cannot be sufficiently achieved by the Member States and if the action can therefore, by reason of its scale or effects, be implemented more successfully by the Union (added value).

- ⇒ Can the Commission provide a detailed analysis of how the above elements of necessity are being reflected in its proposal?

Which leads to the final stage of the "proportionality test", the *proportionality in the narrow sense*, this consists in a balancing act of the burden imposed by the measures, in relation to the objective sought to be achieved.

- ⇒ Can the Commission ensure, beyond reasonable scientific doubt, that a unilateral (indiscriminate) downlisting of the protection status of the wolf across the whole European Union as well as the jurisdictions of the Parties to the Bern Convention, will not lead to a deterioration of the conservation status of the wolf at different levels (local population, regional, national, biogeographical level)? Such an assessment should take special consideration of the possibility of extirpation of the wolf's presence in areas it currently occurs.

- ⇒ Can the Commission ensure, beyond reasonable scientific doubt, that a unilateral/(indiscriminate) downlisting of the protection status of the wolf across the European Union and the jurisdictions of the Parties to the Bern Convention, will not have adverse effects on the populations of species and the ecological condition of habitats protected under the Habitats Directive?
- ⇒ Can the Commission provide an analysis on how the annual loss of 0.065% of sheep due to wolf depredation justifies Europe-wide action that may lead to further deterioration of a species already found to be in unfavorable conservation status in 6 out of 7 biogeographical regions where it occurs, rather than a case-by-case handling of this limited number of cases?