

The Austrian and Spanish wolf cases – two judgments by the EU Court of Justice with important implications for large carnivore conservation and management

Memo for IUCN Large Carnivore Initiative for Europe (LCIE)

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I. INTRODUCTION

In July 2024, the Court of Justice of the EU (CJEU) issued its eagerly awaited judgments in two cases concerning wolf management under the Habitats Directive. The implications of the two judgments for large carnivore conservation and management in the EU appear to be quite significant.

The first judgment, concerning wolf management in Austria, addresses several questions regarding derogations from the strict protection regime of Annex IV of the Directive. The second, concerning wolf management in Spain, contains several clarifications regarding the requirements of the Annex V regime, particularly regarding the scope and conditions for hunting under this regime.

The focus in these cases is on wolves, but many of the Court's findings are highly relevant as regards other large carnivores as well, and indeed regarding Annex IV and V species at large.

Both cases involve preliminary reference procedures, whereby a national court asks the CJEU for clarification of questions of EU law. The CJEU is the highest authority when it comes to settling questions of interpretation of EU law, and its judgments exercise a decisive influence on its application. Large carnivore management is a case in point.

This memo highlights the main findings and observations of the Court in both cases, and adds some brief initial reflections on their implications for large carnivore conservation and management. Much more can (and, no doubt, will) be said about these judgments and their consequences. Also, this memo is not intended to replace reading the texts of the judgments themselves, but as a companion to such reading, which is highly recommended for a more complete understanding of the context and issues involved.

II. AUSTRIAN WOLF CASE – CJEU C-601/22 – 11 July 2024

The Austrian court asked the CJEU four questions, as part of a national case concerning an authorization to kill a wolf which had predated various sheep in the province of Tyrol. The judgment contains important clarifications regarding the interpretation of the three conditions that must be met for a derogation from strict protection to be issued under Article 16 of the Habitats Directive.

The questions are dealt with one by one below. Regarding all four, the Court has largely followed the approach proposed by the Advocate-General (A-G) in her Opinion.

1. Legal status of wolves

The Austrian authorities argued that it is somehow unfair and discriminatory that wolves in Austria have a strictly protected Annex IV status, and submitted that Austrian wolves should have been included in Annex V instead. As expected, the Court is unimpressed, and dismisses Austria's arguments. One of the observations made in the course of doing so is that Habitats Directive species which have achieved a favourable conservation status (FCS) "must be protected against any deterioration of that status" (par. 44).

2. "Favourable conservation status" – level(s) of assessment

This question, and the Court's answer, are particularly consequential. The Court was asked to clarify to what extent transboundary wolf populations may or must be the focus of assessment as regards the FCS criterion of Article 16 – i.e., the requirement that a derogation from strict protection may only be issued when it will not affect the achievement or maintenance of a FCS.

The answer is that the role of the transboundary population in this context is very limited indeed, and that the decisive level of assessment – both when determining conservation status as such, and when determining the impact of proposed derogations on that conservation status – is the "level of the local and national territory of the Member State concerned" (par. 66).

According to the Court, assessments of conservation status and the impact of derogations thereon "must be carried out, in the first place, at local and national level and, in the event of a favourable conservation status at that level, as far as possible, in the second place, at a cross-border level" (par. 60).

Crucially, the judgment makes clear that including the transboundary wolf population concerned in the assessment does not make it easier to meet the FCS criterion (contrary to what has often been assumed or proposed, including by the LCIE). Indeed, the exact opposite is the case, in the sense that taking cross-border segment(s) of a wolf population into account will, if anything, make the granting of a derogation more difficult. This would play out, for instance, in a scenario where the conservation status of wolves at local and national level is favourable, but the proposed derogation concerns a wolf that is part of a transboundary pack, shared with a country whose national wolf population is *not* at FCS.

The above conclusion appears to follow quite inevitably from paragraphs 55-66 of the judgment. (The phrasing in paragraph 58 is a bit cryptic, but any doubt is removed by the reference to paragraph 78 of the A-G's Opinion, and by paragraphs 57, 60, and 66 of the judgment.)

In a nutshell, in the words of the A-G, an "unfavourable national status cannot be remedied through favourable status at the cross-border level" (paragraph 73 of the Opinion, which is expressly referred to by the Court in paragraph 57 of the judgment). It thus appears that population-level management plans are not 'silver bullets' that would make it easier, especially in small member states, to meet the FCS criterion.

Lastly, the Court re-emphasizes the importance of the precautionary principle. That is, “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 [the] species at a favourable conservation status, the Member State must refrain from granting or implementing that derogation” (par. 64). Such uncertainty may pertain to the conservation status of the population as such, and/or to the impact of the envisaged derogation thereon.

A question that remains unanswered is what criteria are to be used exactly in order to determine whether a wolf population is at a FCS at the local and national level, i.e., in this case, “at the level of the Province of Tyrol and at national level” in Austria (par. 65). But clearly, those are the levels that count. Thus, to be most useful in the present context, further work on refining and operationalizing favourable reference values (FRVs) should focus on ways that make the FCS concept work at these levels.

3. “Serious damage” – indirect macroeconomic damage

The judgment makes clear that indirect long-term macroeconomic developments – e.g., a possible future impact of wolf predation on Alpine farming – that are not imputable to a particular wolf, do not come within the scope of the Article 16 derogation ground of preventing “serious damage” to livestock and other types of property.

4. “Satisfactory alternatives” – economic costs

The last question is again of considerable practical significance, as it asks whether the economic costs of non-lethal livestock protection measures can render those measures ‘unsatisfactory’ as an alternative to killing wolves.

The Court approaches this question in a subtle manner. According to the judgment, a balancing act is called for, which may involve economic, social, and cultural factors besides ecological ones. In any given case, the economic costs of an alternative measure is to be weighed against “the ecological cost of taking [the] specimen” (par. 84) in question, in a manner that secures the attainment of the Directive’s objectives.

The economic costs of a technically feasible alternative measure may not, however, by themselves determine the outcome. They may “be taken into account under one of the criteria to be balanced, but without however being decisive” (par. 82). Such an alternative may not be “rejected at the outset solely on the ground that the economic costs of its implementation are particularly high” (id.).

Importantly, the Court (in par. 83) emphasizes that this issue must be viewed within the broader context of “the obligations of Member States to draw up, under Article 12 of the Habitats Directive, systemic measures and management plans necessary for the strict protection” of the species concerned. In the case of wolves, the “implementation of those programmes and management plans” may involve introducing “changes in the agricultural activities concerned” in order to become sufficiently wolf-proof (by employing fencing, guarding dogs, etc.). Such changes, the Court observes, “are necessarily accompanied by

certain costs,” and those costs “cannot constitute a sufficient ground for derogating” from strict protection under Article 16.

III. SPANISH WOLF CASE – CJEU C-436/22 – 29 July 2024

In this decision, the Court provides significant clarifications concerning the obligations of member states regarding wolves (and other species) that are covered by the regime of Annex V of the Habitats Directive.

The Annex V regime and hunting

The questions asked by the Spanish court in this case concern the legality of hunting Annex V animals whose population does not have a FCS. The specific answer of the CJEU to the national court’s questions is that Article 14 of the Directive does not currently allow the designation of Spain’s Annex V wolves as huntable species, on account of the population’s ‘unfavourable-poor’ conservation status.

Although there might be room for (factual) discussion as to whether the latter qualification of the population’s conservation status is accurate, the legal conclusion itself is undoubtedly significant, and so are various other findings of the Court. These findings are all the more relevant in light of current discussions at the European level on the possible amendment of the Directive’s annexes, whereby all wolves would be listed in Annex V.

For instance, the judgment clarifies that there is no airtight connection between a species’ conservation status and its listing in any given annex(es). In particular, the fact that a species is included in Annex V “does not mean that its conservation status must, in principle, be regarded as favourable” (par. 50).

The Court confirms the general obligation of member states to ensure a FCS for Annex V populations. In this regard, member states “have some discretion in determining whether it is necessary to adopt measures” pursuant to Article 14, such as hunting limitations (par. 53). However, this discretion is “limited by the obligation to ensure” that any taking of specimens is “compatible with that species being maintained at a favourable conservation status” (par. 55).

Indeed, “where an animal species has an unfavourable conservation status ..., the competent authorities must ... take measures within the meaning of Article 14 ... in order to improve the conservation status of the species concerned in such a way that, in future, its populations are sustainably maintained at a favourable status” (par. 69). The “restriction or prohibition of hunting” the species could then be viewed as “a measure necessary to restore its favourable conservation status” (id.).

Likewise, the judgment underlines the importance of adequate monitoring, as required by Article 11 of the Directive, and moreover stipulates that such monitoring is in fact a precondition for any exploitation of the species to be permissible. In particular, the hunting of an Annex V species may not be allowed “if effective surveillance of its conservation status is not ensured” (par. 59).

When they take decisions to authorize hunting of Annex V animals, member states must “justify those decisions and provide the surveillance data on which the decisions are based” (par. 62). Furthermore, such decisions must, “to the extent possible”, take account of the impact of such hunting on wolf populations also at a “cross-border level” (par. 63), in line with the approach outlined in the Austrian judgment considered above.

Last but not least, the Court once again highlights the potentially far-reaching influence of the precautionary principle. When uncertainty remains as to whether the hunting or other exploitation of an Annex V species is “compatible with the maintenance of that species at a favourable conservation status,” then the member state involved “must refrain from authorizing such exploitation” (par. 72).

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