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## Conseil d'État, 6ème - 5ème chambres réunies, 04/02/2021, 434058, Inédit au recueil Lebon

**Council of State - 6th - 5th joint chambers**

**Reading of Thursday, February 04, 2021**

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**Rapporteur**

Ms Cécile Vaullerin

**Public Reporter**

Mr. Olivier Fuchs

### Full text

#### **FRENCH REPUBLIC IN THE NAME OF THE FRENCH PEOPLE**

Having regard to the  
following procedure :

By a petition and a reply brief, registered on August 29, 2019 and January 5, 2021 at the Secrétariat du contentieux of the Conseil d'Etat, the association Ferus - Ours, Loup, Lynx, the association pour la protection des animaux sauvages et du patrimoine naturel, the association Pays de l'Ours - Adet, the comité écologique ariégeois, l'association Nature Comminges, l'association Nature en Occitanie, le fonds d'intervention écopastoral, l'association France nature environnement Hautes- Pyrénées, la société nationale de protection de la nature et d'acclimatation de France and l'association Animal Cross ask the Conseil d'Etat:

1°) to annul for excess of power the order of June 27, 2019 of the Minister of State, Minister of Ecological Transition and Solidarity and the Minister of Agriculture and Food relating to the implementation on an experimental basis of measures to scare the brown bear in the Pyrenees to prevent damage to flocks ;

2°) order the State to pay the sum of 4,000 euros under article L. 761-1 of the Code de justice administrative.

Having regard to the other

documents in the file; Having

regard to :

- the Constitution, in particular its Preamble ;
- Council Directive 92/43/EEC of May 21, 1992;
- the Environment Code;
- the Code of Administrative Justice and Decree no. 2020-1406 of November 18, 2020 ;

After hearing in open session :

- the report by Mrs. A... B..., Auditor
- the conclusions of Mr. Olivier Fuchs, public rapporteur;

Considering the following:

1. On the one hand, Article 12 of Council Directive 92/43/EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora, known as the "Habitats" Directive, provides that: "1. Member States shall take the necessary measures to establish a system of strict protection for the animal species listed in Annex IV (a), in their natural range, prohibiting: (...) b) the deliberate disturbance of these species, in particular during the period of reproduction and dependence (...)" The brown bear (*Ursus arctos*) is one of the species listed in point

a) of Annex IV to the Directive. However, Article 16 of the same directive states that: "1. Provided that there is no other satisfactory solution and that the derogation is not detrimental to the maintenance, at a favourable conservation status, of the populations of the species concerned in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b): (...) (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries, water and other forms of property".

2. On the other hand, under the terms of Article L. 411-1 I of the Environment Code, enacted to transpose the Habitats Directive: "Where the conservation (... of non-domestic animal species (...) and their habitats, the following are prohibited: 1° (...) the mutilation, destruction, capture or removal, intentional disturbance or naturalization of animals of these species (...)" Under the terms of Article L. 411-2 of the same code, adopted to transpose Article 16 of the same directive: "A decree of the Conseil d'Etat determines the conditions under which the following are fixed: 1° The restrictive list of natural habitats, non-domestic animal species (...) thus protected; 2° The duration and methods of implementation of the prohibitions taken in application of I of Article L. 411-1; 3° The part of the territory to which they apply (...); 4° The granting of derogations from the prohibitions mentioned in 1°, 2° and 3° of Article L. 411-1, provided that there is no other satisfactory solution, which may be evaluated by a third-party expert assessment carried out, at the request of the competent authority, by an outside body chosen in agreement with the authority, at the expense of the petitioner, and that the derogation does not harm the maintenance, in a favorable conservation status, of the populations of the species concerned in their natural range: (...) b) To prevent significant damage, in particular to crops, livestock (...) and other forms of property".

3. Finally, for the application of these latter provisions, article R. 411-1 of the French Environment Code stipulates that the list of non-domestic animal species subject to the bans defined in article L. 411-1 is drawn up by joint order of the Minister for Nature Protection and the Minister for Agriculture. Article R. 411-6 of the same code specifies that: "The derogations defined in 4° of article L. 411-2 are granted by the Prefect, except in the cases provided for in articles R. 411-7 and R. 411-8 (...)" Article R. 411-13 stipulates that the ministers responsible for nature conservation and agriculture shall issue a joint order, after consulting the Conseil national de la protection de la nature (National Council for Nature Conservation), setting out "(...)" / 2° If necessary, for certain species whose range exceeds the territory of a département, the conditions and limits under which derogations are granted in order to ensure compliance with the provisions of 4° of article L. 411-2 of the Environment Code".

4. Based on the latter provisions, the purpose of the contested order of June 27, 2019 is to set, on an experimental basis until November 1, 2019, the conditions and limits under which derogations to the ban on intentional disturbance of brown bears may be granted by prefects for the protection of domestic herds. Article 2 authorizes the use of two types of scare tactics: simple scaring using sound, light or olfactory means, and reinforced scaring using non-lethal shots. Article 3 of the decree lays down the conditions for the use of simple scare tactics, justified by the occurrence of at least one attack on the mountain pasture during the previous year, or at least four cumulative attacks over the previous two years. The use of the derogation is conditional on the use of means of protecting the herd as defined by rural development plans, or measures recognized as equivalent, unless the herd is recognized as unprotected. Under the terms of the decree, agents of the Office national de la chasse et de la faune sauvage are required to provide prior information, and the prefect is required to submit an annual report on the implementation of the decree. Article 4 of the decree sets out the conditions for the implementation of reinforced scaring, subject to the implementation of simple scaring and the occurrence, despite the effective implementation of simple scaring means, of a second attack in less than a month or, on estives having suffered at least four attacks over the last two years, from the first attack attributable to the bear. Article 5 of the decree requires the authorization of the director of the Pyrenees National Park for any scare tactics in the heart of the park.

5. In France, the brown bear now lives only in the Pyrenees. While the species still numbered around 150 individuals in France at the beginning of the 20th century, the bear population declined sharply over the course of the century, to just 7 or 8 individuals in the 1980s. Despite the protection regime instituted in 1981 and the reintroductions carried out from 1996 onwards, the species' conservation status has not returned to an acceptable level.

favorable within the meaning of Article 1 of Directive 92/43/EEC of May 21, 1992. The various studies in the file show that the number of brown bears in the Pyrenees will be around fifty in 2019. It also emerges from the assessment report drawn up on September 26, 2013 by the Muséum national d'histoire naturelle at the request of the Government that, despite the positive trend in numbers and range, and despite the stability of the species' habitat, the future outlook remains unfavorable, insofar as numbers in the range remain below the reference value deemed necessary to ensure the species' survival, estimated at around one hundred individuals.

On the plea alleging infringement of the precautionary principle:

6. Although the claimants maintain that the contested decree infringes the precautionary principle as defined by article 5 of the Charter of the Environment, the risks invoked for the viability of the species, in the case of a regulation whose purpose is to organize the conditions for implementing derogations to the principle of protection of protected species and their habitats laid down by directive 92/43/EEC of May 21, 1992 and articles L. 411-1 et seq. of the Environment Code, are not among those referred to in that article, which are uncertain in the light of current scientific knowledge. Consequently, the plea raised can only be rejected in any event.

Pleas alleging infringement of article L. 411-2 of the Environment Code:

As regards the plea alleging infringement of the condition relating to the existence of significant damage to livestock farming :

7. The provisions of article 3 of the contested decree make the use of simple scaring measures conditional on the herd having suffered "at least one attack on the estive during the year preceding the request, or at least four cumulative attacks on the estive during the two years preceding the request". The provisions of article 4 of the contested decree authorize the implementation of reinforced scaring measures "from the second attack within a period of less than one month (...) or, for estives having suffered at least four cumulative attacks over the previous two years, from the first attack attributable to the bear (...). "An attack is defined in article 3 of the contested decree as "any attack for which the responsibility of the bear could not be excluded and giving rise to at least one victim compensable for bear predation". The provisions of the contested decree therefore only allow for the use of simple or reinforced scaring measures in cases where the herd concerned has already suffered clear-cut damage. Consequently, the argument that the contested decree fails to meet the condition of significant damage to livestock as set out in article L. 411-2 of the Environment Code can only be rejected.

As regards the pleas alleging disregard for the condition relating to the maintenance, in a favorable conservation status, of the populations of the species in its natural range and the condition relating to the absence of any other satisfactory solution:

8. While the need to protect livestock farms is one of the reasons which, under the aforementioned provisions of Directive 92/43/EEC of May 21, 1992, may justify a derogation from the prohibition on intentionally disturbing the living conditions of a species protected under Article L. 411-1 of the Environmental Code, which is in an unfavorable conservation status, such derogatory measures can only be legally adopted if they do not affect the maintenance of the populations concerned in their natural range and do not compromise the improvement of the species' status.

9. It is clear from the documents in the file, in particular the report carried out by the Conseil général de l'environnement et du développement durable and the Conseil général de l'alimentation de l'agriculture et des espaces ruraux, published in September 2018, that in the state of available knowledge, the simple scaring measures using sound, olfactory or light means, implemented under the conditions provided for by the contested order, are not likely to harm the maintenance of bear populations or compromise the improvement of the species' conservation status.

10. On the other hand, article 4 of the contested decree, provided that the conditions it lays down in terms of attacks on herds are met, allows any stockbreeder, pastoral group or mountain pasture manager to apply to the prefect for a derogation permitting the use of non-lethal firearms loaded with rubber cartridges or double detonation cartridges to scare off animals, and stipulates that the derogations granted are valid for two months and may be renewed twice. It allows these reinforced scaring operations to be carried out by farmers or shepherds who hold a hunting license, or by lieutenants de louveterie or by hunters or by agents of the Office national de la chasse et de la faune sauvage, after prior training by agents of this Office. By thus opening up the possibility of using reinforced scaring, without further regulating the conditions for its implementation, the provisions of the contested decree relating to this method of scaring do not make it possible to ensure, in view of the effects of such scaring on the species, that the derogations likely to be granted on this basis by the Prefect do not, in the light of the state of knowledge prevailing at the date of the contested decree, harm the

maintain the populations concerned in their natural range and do not compromise the improvement of the species' status. Consequently, the applicant associations are entitled to maintain that the order, insofar as it provides for reinforced scaring measures, infringes the provisions of article L. 411-2 of the Environment Code and is vitiated by illegality.

On the claim for costs :

11. In the circumstances of this case, the State should be liable for the sum of 2,000 euros to be paid to the association Ferus - Ours, loup, lynx et autres under the provisions of article L. 761-1 of the Code of Administrative Justice.

D E C I D E :

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Article 1: The terms "two" and "reinforced scaring, using non-lethal shots" in article 2 and article 4 of the order of June 27, 2019 relating to the experimental implementation of measures to scare the brown bear in the Pyrenees to prevent damage to flocks are cancelled.

Article 2: The State will pay the association Ferus - Ours, loup, lynx et autres the sum of 2,000 euros, pursuant to article L. 761-1 of the French Code of Administrative Justice.

Article 3: The remainder of the claim is rejected.

Article 4: The present decision will be notified to the association Ferus - Ours, Loup, Lynx, first named for all the applicants, to the Minister of Ecological Transition and to the Minister of Agriculture and Food.

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