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Under Fire from All Directions

Swedish Wolf Management Hunting Scrutinized by Brussels...and at Home

Introduction

As widely known, there is an ongoing infringement proceeding in the European Commission on Swedish wolf-hunting policy, initiated in early 2010 by four environmental NGOs. They claimed that Swedish 'license hunting' breached obligations under the EU's Habitats Directive. Following certain exchanges in 2010, the European Commission sent a formal notice to the Government in January 2011 and the reasoned opinion came in June. When the Government answered two months later, it – according to its own words – announced a temporary change of policy in order to circumvent the legal action from Brussels. However, the wolves' reprieve was short lived. In 2012, the Swedish Environmental Protection Agency (SEPA) released a management plan that included the use of management hunting. The commission again strongly criticized this plan and threatened enforcement action. The Government replied in January of 2013 with a defence of the plan. A few days later, the 2013 hunt was decided by the SEPA.

Although the infringement proceeding remains open, the Commission has not initiated further legal action. This is because the matter is currently before the Swedish administrative courts. Previously, it would have been impossible for a Swedish NGO to bring a legal proceeding alleging a violation of the Habitats Directive. Due to the 2011 decision by the Court of Justice (CJEU) in the *The Slovak Brown Bear* case (C-240/09), interpreting the Member States' obligations under the Aarhus Convention, however, environmental NGOs have finally been able to do so. This time, the Stockholm Administrative Court granted the NGOs standing and quashed SEPA's decision, agreeing that the hunt violated EU law. The decision has been appealed, though not yet decided at the time of this writing.

In Sweden, the wolf policy and the infringement proceedings have triggered a lively public debate, raising a number of interesting questions affecting Union interests and the freedom of Member States to choose their own methods of dealing with controversial issues. Many of these are highly political and relate to the legitimacy of the Union itself. This article, however, concerns itself with the much narrower scope of the legal matters raised in the infringement proceedings. To some extent, it also discusses the roles of environmental NGOs and the European Commission as defenders of Union law. An analysis is undertaken of the Swedish regulation on license hunting in comparison with the legal requirements of the Habitats Directive. The authors conclude that the Swedish wolf policy is in breach of the obligations according to Union law to protect endangered species.

Background

Owing to intensive persecution on the part of farmers and landowners, the wolf population in the late 1960s became functionally and genetically extinct in the Scandinavian Peninsula. However, since hunting was banned in 1966 there has been a revival. The recovery started slowly. From three wolves in the early 1980s, numbers grew to six some 20 years later. By the start of the new millennium growth had become more rapid, with numbers increasing to nearly 50 in 2004 and to more than 200 by 2010. During the winter of 2011/2012, the Scandinavian population was estimated at between 260 and 330, 90%

of which are located in Sweden or on the border with Norway. Packs have been established in several territories in central Sweden. The annual number of litters was estimated to be around 30 in 2010 and 2011; in 2012 there was a record of approximately 38 litters. The wolf population has been spreading towards the eastern and southern parts of the country. However, the genetic base for the population is extremely small and inbreeding coefficients are very high. The present population results from a natural re-colonisation of no more than three wolves from the neighbouring Finnish/Russian population in Karelia. It was not until 2008 that two more immigrants from the east succeeded in passing the reindeer herding areas in Finland and Sweden and began contributing genetically to the population. Accordingly, the effects of inbreeding depression have already been documented in the population.

The wolf issue is a subject of intense disagreement in Sweden. Wolf establishment is widely regarded as being incompatible with Sami reindeer herding in the northern part of the country. To some extent there is also a conflict with sheep farming, though this has been successfully resolved in many instances with electric fences and other proactive measures. However, the main objection to the rehabilitation of the wolf population comes from hunters and their organisations, who consider wolves to be competitors for game species, such as deer and moose. Additionally, experiences involving wolf-predation of hunting dogs have aroused the media's attention and further fuelled the debate. The wolf issue also takes on a clear dimension of conflict between the urban and rural, the centre and the periphery, 'us and them' - elevating the subject to the symbolic. It is also highly political. Resistance towards wolf recovery is strong and poaching is widespread. In fact, almost half of wolf mortality is estimated to result from poaching.¹

As with any social controversy, the wolf issue has been illuminated and discussed in the media, in commission reports, Government investigations, and research articles. Today's wolf policy began with the assignment of a commission to investigate the matter in 2006. In its report the commission proposed 'management hunting' of the species.² The proposal was largely accepted by the Government and new legislation was enacted in the autumn of 2009.³ The cornerstone of the new wolf policy was a cap on total population in Sweden to not more than 210 specimens and at least 20 litters born per year over the coming three years. This level was to be maintained through protective hunting and license hunting. Furthermore, the policy mandated the introduction of up to 20 wolves from Finnish/Russian Karelia in order to strengthen the population's genetic diversity. It also confirmed the position that in principle no wolves should be allowed within the all-year-round reindeer herding regions of northern Sweden.

Within the framework of the parliamentary decision, the new policy was managed by the SEPA. The idea was that each year, the authority should decide on the 'license hunting' of a certain number of wolves in different regions. The first decision came in December 2009.⁴ The legal reasoning behind it was that it was the only way to deal with social conflicts arising from the existence of wolves and to increase acceptance in rural are-

¹ Liberg, O., Chapron, G., Wabakken, P., Pedersen, H.C., Hobbs, N.T. & Sand, H. 2011. Shoot, shovel and shut up: cryptic poaching slows restoration of a large carnivore in Europe. *Proceedings of the Royal Society B* 279 (1730): 910-915.

² SOU 2007:89 Rovdjuren och deras förvaltning (management of large carnivores).

³ Prop. 2008/09:210 En ny rovdjursförvaltning (new policy for large carnivores).

⁴ SEPA decision 2009-12-17, Dnr 411-7484-09 Nv.

as. SEPA also ensured that the decision accorded with the Habitats Directive and the case law of the CJEU. The decision – which took immediate effect – set the quota for 2010 at 27 animals. The culling was organised by granting permits to all those with ‘hunting rights’ (mostly landowners and tenants). Some 4,500 people took part in the hunting and most of the permissible kills were made on the first day. The season, which was supposed to have run from January 2 until February 15, was cut short after just four days. This pattern was repeated in 2011, when 19 out of a quota of 20 wolves were killed.⁵ Fifteen wolf couples were split, equivalent to 40 per cent of all couples. Kills during the 2010 and 2011 license hunts amounted to almost 15 per cent of the wolf population. Total mortality – also taking account of protective hunting, poaching and accidents – was 70 wolves during 2010, more than 30 per cent of the population in Sweden and Norway.⁶

Legal framework

From International to national law on species protection

The wolf is protected as an endangered species under international law, EU law and national legislation. First, it is listed under Annex II to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).⁷ Article 6 states that Contracting Parties shall prohibit all deliberate capture, keeping, killing or disturbances during sensitive periods of protected members of the listed species, deliberate damage to breeding or resting sites, and the trade of such animals. Possible exceptions to these prohibitions are listed in Article 9.1, provided no other satisfactory solution is available and it is not detrimental to the survival of the population concerned. Under those circumstances, exceptions can be made in individual cases in order to prevent serious damage to crops, livestock, forests and other forms of property. Exceptions can also be made to permit the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers.

Both the European Union and Sweden are Contracting Parties to the Bern Convention. In the EU, this convention is implemented by Directive (92/43) on the conservation of natural habitats and of wild fauna and flora (Habitats Directive).⁸ Its aim, as expressed in Article 2, is to contribute towards ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora on European territory. Measures, according to the Directive, shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora, while taking into account economic, social and cultural requirements and regional and local characteristics. Wolves are an animal ‘of community interest in need of strict protection’ and ‘prioritised’ under Annex IV(a). This status means that Member States must follow a programme of strict protection for wolves, including prohibiting their intentional capture or killing, in accordance with Article 6 of the Bern Convention and Article 12.1(a) of the Habitats Directive. Derogation is permitted only if certain preconditions in accordance with Article 16.1 are met. The relevant parts of the provision state (our italics):

⁵ SEPA decision 2010-12-17, NV-03454-10.

⁶ Opinion by the Swedish Species Information Centre (ArtDatabanken) 2011-02-18 (ref. 33/11 2.3).

⁷ Bern, Switzerland, 1979-09-19, CETS 104.

⁸ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

1. Provided that there is *no satisfactory alternative* and the derogation is *not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status* 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 and water and other types of property;

(c) in the interests of public health and public safety, or for other *imperative reasons of overriding public interest*, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(...)

(e) to allow, *under strictly supervised conditions*, on a *selective basis* and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in *limited numbers* specified by the competent national authorities.

According to Article 1(e) of the Directive, the conservation status of a species is ‘favourable’ when population data indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitat, and there is, and will continue to be, a sufficiently large habitat to maintain its populations. In other words, such is the situation for a species where it is doing sufficiently well in terms of quality and quantity and has good prospects of continuing to do so in the future.⁹

The Habitats Directive is the younger of the two ‘nature conservation directives’ of Union law. The older is the Birds Directive of 1979, today Directive 2009/47.¹⁰ Articles 5 and 9 of the Birds Directive contain similar provisions regarding species protection to Article 12 and 16 of the Habitats Directive. Case law of the CJEU is already somewhat extensive on the provisions of the Birds Directive, and thus of great importance for the understanding of similar language in the Habitats Directive.¹¹

In Sweden, the regulatory framework for protection of wolves is expressed in the Environmental Code as well as hunting legislation (Hunting Act (1987:253) and Hunting Ordinance (1987:905)). According to Section 23c and 23d of the Hunting Ordinance, SEPA can decide to allow ‘license hunting’ under those conditions mentioned at the start of Article 16.1 in the Habitats Directive; that no other satisfactory solutions exist and it is not detrimental to the maintenance of a favourable conservation status of the population in its natural range. A further condition is that such hunting is appropriate with regard to the size of the population and its composition. Hunting is also required to be selective and conducted under strictly controlled conditions.

The Finnish wolf case (C-342/05)

There are very few cases in the CJEU concerning the possibilities for derogation enumerated in Article 16 of the Habitats Directive. One case, however – the Finnish wolf case (C-342/05) – has formed an important part of the debate on the new wolf policy in Swe-

⁹ Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive, European Commission (Brussels), final version, February 2007 (hereinafter Guidance Document 2007), page 9.

¹⁰ Directive 2009/47/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (codified version of Directive 79/409/EEC as amended).

¹¹ Guidance Document 2007, page 7.

den. In order to provide a comprehensive picture, it is therefore necessary to begin with a summary of that case. The background is that wolf-hunting was authorised on a case by case basis by the competent game management districts in Finland. However, there was an upper regional limit for wolves to be hunted, which was set by the Ministry of Agriculture and Forestry. When authorising protective hunting in an individual case, the management district was obliged to consider whether the conditions set out in Article 16.1 of the Habitats Directive – which were transposed literally into national law – were satisfied.

The European Commission brought an infringement action against Finland for contravening the requirement for strict protection of the wolf under Article 12 of the Habitats Directive. The Commission claimed that the administrative practice in Finland authorised hunting as a preventive measure, which was in breach of Article 16.1. It argued that since the conservation status of the wolf in Finland was not favourable, alternative approaches should be employed. Moreover, the hunting permits were issued without any relationship being properly established to the particular animals causing serious damage.

The Finnish Government argued that wolf hunting required a permit, which was granted or denied after an examination of the conservation level of the species. The decision was made after ensuring that all other conditions for derogation in the Habitats Directive were satisfied, including the absence of any alternative solutions. The Government also submitted that Article 16.1 of the Directive allowed for derogations to prevent serious damage, even though the species concerned had not yet reached favourable conservation status. Finally, the permit decisions identified those wolves causing serious damage. The geographical area covered was precisely determined, as were the packs, and in certain cases, even the individual animals to be killed.

In her opinion, the Advocate-General Kokott sided with the Commission. However, she did not agree that preventive hunting was always prohibited as long as the species did not have favourable conservation status. On the contrary, it must be possible to grant derogations if doing so is the only way to avert immediate risk to human life and health or general interests of superior value. According to Kokott, this is in line with the principle of proportionality, which has been confirmed in similar cases by the CJEU.¹² However, in this case there were no such interests involved that could justify the Finnish administrative practice, especially since permission for the hunting of wolves was not restricted to those animals that caused the damage.

The CJEU's judgment first stated that the case did not concern deficiencies in Finnish legislation implementing the Habitats Directive, or individual decisions on wolf hunting. The question rather was whether the administrative practice in the country contravened Article 16.1. The Court stated that this was incumbent on the Commission to prove. Further, the derogation provision in Article 16.1 must be interpreted strictly and the national authorities must show that necessary conditions were present in each individual case. Accordingly, Member States were required to ensure that all action affecting protected species was authorised only on the basis of decisions containing reasons referring to the requirements laid down in Article 16.1.¹³

¹² Here, the Advocate General referred to C-57/89 *Leybucht* (para 21, 23 and 25), which concerned coastal protection and the danger of flooding.

¹³ The judgment at para 25, where the Court referred to case C-60/05 *WWF*, para 34.

The CJEU went on to decide whether derogation under Article 16.1 could only be granted if the species in question had already reached favourable conservation status. Referring to the Commission's own Guidance Document on the strict protection of animal species under the Directive, the Court ruled that this was not the case: '*(T)he grant of such derogations remains possible by way of exception where it is duly established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status*'.¹⁴ The reason is that the killing of a limited number of animals may have no effect on the objective envisaged in Article 16.1 – that is, to maintain the wolf population at a favourable conservation status in its natural range – and therefore would be of neutral effect for the population.

In its application, the Commission had submitted two decisions by Finnish authorities, permitting protective hunting of a fixed number of wolves in a well-defined geographical area, but without taking account of the conservation status of the species or alternatives, and without specifically identifying the wolves causing serious damage. The CJEU said that such decisions clearly were contrary to Article 16.1.¹⁵ However, they were taken before the end of the period that had been laid down in the reasoned opinion by the Commission. In the present case, it was therefore the responsibility of the Commission to prove that there existed an administrative practice of a consistent and general nature thereafter, which contravened the Habitats Directive. As the numbers of wolves had increased since the case was initiated, and in addition to that, the Commission had failed to show sufficient evidence of such a practice by the Finnish authorities after that date, the application was dismissed. Nor did the Court find the system with regional quotas within the management districts in breach of the Directive, since these only constituted a framework within which decisions on protective hunting may be made.

However, the CJEU found that Finland had failed to meet some of its obligations under the Habitats Directive: the practices of allowing protective hunting without identifying the damaging wolf, and killing of one or more members of a pack without having established that this measure would prevent serious damage, were beyond the scope of permissible derogations set out in Article 16.1.

The infringement case and Swedish license hunt

The complaint

In January 2010 four environmental NGOs – Svenska Naturskyddsföreningen (Swedish Society for Nature Conservation), WWF/Sweden, Rovdjursföreningen (Swedish Carnivore Association) and Djurskyddet Sverige (Animal Welfare Sweden) – wrote to the European Commission claiming that the 2009 decision on the 'license hunting' of wolves contravened EU law.¹⁶ The complaint was three-pronged. The NGOs claimed first that license hunting breached Article 12 of the Habitats Directive. They asserted that the exemptions in Article 16 do not allow hunting for the purpose of management of a species that did not have a favourable conservation status in the region. Second, restrictions preventing wolves from settling in the reindeer herding areas transgressed Article 12. Third,

¹⁴ The judgment para 29 with reference to the Guidance Document 2007, Section III, para 47-51.

¹⁵ The judgment at para 30-31.

¹⁶ See http://www.naturskyddsforeningen.se/upload/press/EU-anmalan_varg.pdf - however, only in Swedish.

the decision was not open to challenge in court by anyone opposing the hunt, which infringed both the Aarhus Convention and the principle of effectiveness under Union law.

The Commission's standpoint

The Commission examined the complaint and in June 2010 wrote an initial letter to the Swedish Government. There followed communications and meetings throughout the remaining year.¹⁷ In December, the Commissioner issued a summarising document, arguing that license hunting contravened the Habitats Directive.¹⁸ The new hunting decision for 2011 was imminent, which Commission requested the Swedish Government delay. Nevertheless, a week later the SEPA released its decision on the license hunt for 2011¹⁹, which was explained to the Commission in a letter, a week after that, by the Swedish Ministry of the Environment.²⁰ In that letter the Swedish minister highlighted a statement from the Large Carnivore Initiative for Europe (LCIE). This body expressed its confidence in the effectiveness of the 2010 hunt, and also that 'as conducted [the hunt] could have been justified under several derogation criteria' in Article 16 of the Habitats Directive.²¹ This course of events left the Commission 'with little choice' but to initiate infringement proceedings by way of a formal notice to the Swedish Government at the end of January 2011.²² The Swedish Government replied to the Commission in late March.²³ The Commission's reasoned opinion²⁴ came in June and the Government answered two months later.²⁵

In short, the infringement case concerns breach of Article 12 of the Habitats Directive, without having legal grounds for derogation under Article 16.1(e).²⁶ The issues that, according to the Commission, raise special concern are the set limits for numbers of wolves in Sweden, the license hunt and the reduced distribution area for wolves due to their al-

¹⁷ These were made in the data base EU Pilot (case EU Pilot 928/10/ENVI), a portal which is closed to the public. However, most of the important documents have been disclosed owing to the Swedish principle of transparency under the Constitution (The Freedom of the Press Act, 1949 (1949:105)).

¹⁸ Letter from Janez Potočnik, Commissioner for the Environment (DG 11), Brussels 2010-12-07 (dnr. M2010/4931/Na).

¹⁹ SEPA decision 2010-12-17, NV-03454-10.

²⁰ Letter from Andreas Carlgren 2010-12-22 (dnr. M2010/4931/Na).

²¹ Position statement from the LCIE on the 2010 Swedish wolf hunt, December 2010, citation from page 3. The LCIE is an advisory body under the International Union for Conservation of Nature (IUCN) and consists of members with experience in the fields of ecological and human-dimensions research, wildlife management and nature conservation. This statement was also repeated before the 2011 license hunt, Statement version 2 (3 February 2011). See www.lcie.org.

²² The citation from a statement by Janez Potočnik on 17 January, the formal notice was issued in Brussels on 27 January (case 2010/4200 K(2011)360), see <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/95&format=HTML>.

²³ Miljödepartementet (Ministry of the Environment) 2011-03-28, M2011/647/R.

²⁴ Reasoned Opinion addressed to Kingdom of SWEDEN on account of its failure to fulfil its obligations under Article 12 and 16 of Directive 92/43/EEC on the conservation of natural habitats and of wild flora and fauna under Article 258 of the Treaty on the Functioning of the European Union, Brussels 16.6.2011, 2010/4200, K(2011) 4030 final.

²⁵ Reply on Reasoned Opinion (...), KOM:s ref SG-Greffe(2011) D/9725, dnr 2010/4200, Stockholm 2011-08-17.

²⁶ Reasoned opinion para 2.14. This was also made clear early on in the proceedings, see the above mentioned statement from the Commission 2011-01-17.

lowed presence in principle only in areas outside the reindeer herding areas in northern Sweden.

According to the Commission, the derogation criteria in Article 16.1(e), like all derogation criteria, shall be narrowly interpreted, especially in relation to such species as the Scandinavian wolf, which does not have favourable conservation status. Before exploiting the derogation possibility, it must be clearly demonstrated that there are no other satisfactory alternatives. It must also be duly established that the derogation will not worsen or prevent the restoration of favourable conservation status. The Commission maintains that this was not the case when the second decision was taken by SEPA, since there had been no evaluation of the 2010 hunt. In fact, the hunt worsened the conservation status of the species. Also, the hunt did not meet the factors required for derogation under 16.1(e): it could not be described as 'selective', as the decision did not take into consideration the genetic differences between inbred wolves and (first generation) offspring from wolves of eastern origin, which needed particular protection from possible future hunting. Additionally, the hunt should have targeted certain packs or groups of packs in areas where the wolf presence was particularly controversial. The numbers of killed wolves cannot be regarded as 'limited' because the hunting bag limit for the two years constituted 15 per cent of the population and the license hunt was by far the major cause of mortality for wolves in Sweden during that period.

Furthermore, the Commission states that Sweden has failed to show that social acceptance for wolf existence has increased as a result of the hunt. The Commission also expresses its concerns regarding the introduction of wolves from Finland/Russia which has been announced, but to date not begun. And lastly, regarding the fact that more than half of Sweden – that is, the reindeer herding areas – is forbidden land for wolves does not only impair the possibilities for the wolf population to grow, but also contravened the policy to improve the genetic base of the species by means of natural migration of specimens from Karelia.

Finally, the Commission expresses its concern that the erroneous interpretation and implementation of Article 16.1 of the Directive may lead to a multi-annual practise of similar decisions in the future.

Response from the Swedish Government

The Swedish Government's initial response to the Commission's legal action was to deny that the license hunt contravenes the Habitats Directive. It claimed that the aim of the new wolf policy was for wolves to achieve the favourable conservation status they currently lacked. This requires strong and controversial measures, and the different aspects of wolf policy cannot be considered in isolation. Genetically strengthening the wolf population requires an acceptance that cannot be achieved without license hunting and the decentralisation of responsibility and decision making to those affected by the presence of wolves. It is therefore crucial to involve the people who suffered from the presence of the species in their communities. This can be achieved by different means, such as participation in the decision-making of the regional Wildlife Management Boards (Viltförvaltningsdelegationerna) and strict and closely monitored license hunting. Here, the Government stressed the conflict with hunters and the tradition of using unleashed dogs for hunting purposes in forests. It also argues that poaching has decreased after the 2010 license hunting season.

Moreover, the Government argued that the hunt has not negatively impacted the potential for reaching a favourable conservation status for the species. The total number of wolves in Sweden has not decreased as a result of license hunting. The hunt has proceeded under strict guidelines and was closely monitored. No genetically valuable individuals were killed. The conditions for the operation were extremely stringent and it was emphasised in the decision that any deviation would be reported as a criminal offence. The time for the hunt was short and set to a period not sensitive for the species in relation to the breeding of young wolves or the maintenance of the social structure of the packs. The cap for the number of wolves to 210 was limited to the three years of 2010-2012. After that, a new decision would be taken by Parliament.

According to the Swedish Government, there is no absolute ban on the existence of wolves in the reindeer herding areas. The same rules for protective hunting applies there as in any other area of the country. However, it is widely appreciated that reindeer herding is impossible in areas hosting a permanent wolf population.

Finally, the Swedish Government stated that the introduction of new genes to the wolf population had already begun, by translocating wolves from northern Sweden to the country's middle.²⁷ It emphasized that it had been thoroughly investigated how to establish 'fresh blood' in the wolf population. This could be done by introducing wolf pups from zoos into existing wolf packs, or by making a corridor through the reindeer herding area to enable immigration of wolves from Karelia.

However, in its response in August to the reasoned opinion – facing the threat that the Commission would ask the CJEU to grant an injunction against a decision on license hunting for 2012 – the Government 'made a poodle'.²⁸ Without actually abandoning any of its standpoints on the legal issues, it now declared that the cap of 210 wolves in the country was no longer in force and that there would be no decision on license hunting for 2012. In addition, SEPA was allocated the task of issuing a management plan for the wolf population, to be presented in mid-2012.

The 2013 decision on license hunt

Although the license hunting season planned for the beginning of 2012 had been cancelled, tensions between the Swedish Government and Brussels continued to grow. Pressure from the farming and hunting organizations never let up, and during the fall it became apparent that the Government decided to defy the Commission, this time with a new argument. The decision to allow a hunting season was no longer justified as a way to increase social acceptance for national wolf policies, but rather as the first step towards improving the species' genetic status. A scientific study was commissioned from Skandulv. The Government then signalled for SEPA to take a new decision on license hunting, using the Skandulv study for scientific support. Discussions between the Commission and Government became increasingly contentious through several meetings and communications, and on the 25th of January, Environmental Commissioner Janez Potočnik wrote a letter to Sweden's minister of the environment in which he expressed his displeasure. He noted that the Government's management plan for wolves – which was published in Ju2012 – lacked both any concrete description of measures to improve the genetic status of wolves, a necessary intermediary management goal, as well as data regarding long

²⁷ Actually, as of today, five wolves have been translocated from north to south.

²⁸ In Swedish the expression means to 'roll over' or 'cave in'.

term population goals. Minister of the Environment Lena Ek answered five days later with a letter in which she defended both the administrative plan and a decision that the SEPA had taken the same day to authorize so-called ‘selective hunting’. While the name was new since the 2010 and 2011 hunting seasons, the effect was quite familiar: hunters were again to be licensed to kill wolves in early 2013.

The SEPA’s decision allowed the hunting of sixteen wolves from eight packs.²⁹ The reason given for the decision to authorize this new type of management hunt was the claim that hunting was the only way to reduce inbreeding in the short run. Successful genetic improvement in the long run of course depended upon the successful reintroduction of unrelated wolves into the gene pool. Potential other measures for reintroducing wolves had not been taken, but if they were, the result could be an improved conservation status for the wolf population. The hunting decision was effective, and could be acted upon, immediately. Several environmental NGOs appealed the decision and sought an injunction. Defying expectations, the Stockholm Administrative Court denied the request for an injunction, and several days passed before the Administrative Court of Appeal granted it.³⁰ By this time, three of the wolves had already been killed. SEPA appealed the injunction, but the Supreme Administrative Court declined to hear the appeal.

Standing for NGOs in environmental decision making

During 2012, other events occurred with major implications on the wolf issue in Sweden. That year, the Swedish courts revised their attitude towards standing for NGOs in environmental decision making under the pressure of union law, making public interest litigation possible. The background was that SEPA took a decision in November of 2011 to cull the so-called ‘Kynna’ wolf under regulations allowing protective hunting. The Swedish Society for Nature Conservation appealed and requested that the decision be enjoined. The Stockholm Administrative Court dismissed the case, fining that the plaintiff lacked standing to appeal. The Stockholm Administrative Court of Appeal agreed that the NGO lacked standing, and the NGO appealed further to the Supreme Administrative Court (SAC). Although the Kynna wolf had long since been shot, SAC, in June of 2012, remanded the case back to the Administrative Court of Appeal.³¹ SAC pointed out that Sweden is a signatory to the Aarhus Convention, and referred to CJEU’s holding in *Slovak Brown Bear*. In that case, CJEU held that it was a union law requirement for the courts of the Member States to interpret – to the fullest extent possible – the national procedural rules in accordance with the objectives of wide access to justice and effective judicial protection in order to enable for environmental organisations to challenge potential violations of EU law in the national courts. SAC also noted that there was no determinative precedent on environmental NGOs’ ability to appeal administrative decisions on the hunting of species protected under EU law. SAC therefore found reason to reconsider the standing issue, and the case went back to the Administrative Court of Appeal.

²⁹ Förvaltningsrätten i Stockholm 2013-02-01; 2428-13 resp. Kammarrätten i Stockholm 2013-02-06; 746-13.³⁰ Förvaltningsrätten i Stockholm 2013-02-01; 2428-13 resp. Kammarrätten i Stockholm 2013-02-06; 746-13.³¹ HFD 2012-06-28; 2687-12.

³⁰ Förvaltningsrätten i Stockholm 2013-02-01; 2428-13 resp. Kammarrätten i Stockholm 2013-02-06; 746-13.³¹ HFD 2012-06-28; 2687-12.

³¹ HFD 2012-06-28; 2687-12.

In January of 2013, SEPA made another decision to cull two additional wolves. This time, the Stockholm Administrative Court granted the request for an injunction filed by two NGOs, which meant that the court, in a departure from earlier case law, recognized the organizations' standing.³² A Sami village appealed the injunction to the Stockholm Administrative Court of Appeal, which was therefore now forced to take a position on the question which it had considered since June of 2012, namely the right to appeal. The Appeals Court made the same determination as the lower court, accepting the NGOs' standing, and thus denied the appeal of the injunction.³³

The review of the license hunting decision in substance

In May 2013, the Stockholm Administrative Court handed down its decision on the 2013 license hunting season authorized by SEPA. Although the earlier injunction meant that the hunting season would not be able to go forward during 2013, as the season's end date was in February, the court acknowledged the situation was likely to repeat itself in later years, and thus ruled on the merits of the case.

The three environmental NGOs appealed the initial SEPA decision, arguing that SEPA's designation of a hunting season constituted a violation of EU and Swedish law. In addition to this, they asked the court to request a preliminary ruling from the CJEU in the hopes of resolving the national Government's long-standing disagreement with the European Commission regarding how to interpret the Habitats Directive.

The court first considered whether to make a request for a preliminary ruling to determine whether hunting was congruous with articles 12 and 16 of the Habitats Directive. However, it declined to do so as it held that the *Finish Wolf Case* provided ample counsel from CJEU on how to understand article 16.1.

The court then contemplated whether SEPA's decision to allow hunting satisfied the conditions for derogation set out in article 16.1(e). The court cited *Finish Wolf's* requirement that grounds for derogation be interpreted strictly and that the responsibility for demonstrating that the requirements for derogation were met lay with the administrative authority. The court found that SEPA's announced hunting decision did not satisfy three of these required factors: lack of a satisfactory alternative, that the derogation must be on a selective basis and to a limited extent, and that it must affect a limited number of individual members of the protected species.

SEPA asserted that the only satisfactory means to improve the genetic composition of Sweden's wolf population in short term was to permit the hunting of a specific number of wolves. Decreasing the number of inbred wolves would magnify the significance of the later introduction of unrelated wolves to the gene pool. The agency insisted that the NGOs' preferred methods, including enabling the natural immigration of unrelated wolves from the east, transferring unrelated wolves to Sweden, and preserving genetically valuable wolves, would only deliver benefits over the long term.

The court studied the feasibility of alternate actions. It observed that SEPA had unsuccessfully attempted to relocate wolves in previous years. One genetically valuable wolf had been translocated from the country's reindeer husbandry area three times; three

³² Förvaltningsrätten i Stockholm 2013-01-17; 1128-13.

³³ Kammarrätten i Stockholm 2013-02-07; 4390-12, 4396-12.

times it had returned to its territory.³⁴ The purpose of these efforts, though, had been to avert damage to reindeer rather than to improve the genetics of Sweden's wolves. Consequently, actions to encourage the wolf to breed with Swedish wolves, such as relocating the wolf near Swedish wolves or transferring a Swedish wolf close to her, had not been taken. The court decided that relocating genetically valuable wolves was another satisfactory solution capable of contributing to the reduction of inbreeding in the Swedish wolf population. Moreover, the court determined that the exchange of wolves with Russia and the placement of zoo-raised pups in wild dens also constituted satisfactory alternative solutions for reducing inbreeding in both the short and long term. Each of these prospective solutions ran afoul of article 12 of the Habitat Directive's ban on capturing strictly protected species. However, those measures do less harm than a wolf hunt to the principal goal of restoring and upholding the favorable conservation status of species. Noting the principle of proportionality, the court stated that the least disruptive measures should be employed. Consequently, SEPA's authorization of a hunting season breached article 16.1 because less disruptive satisfactory solutions were available.

Derogation is impermissible if not all of the criteria of article 16.1 are met. Although the hunting decision was already determined not to meet the criterion of lack of an alternative satisfactory solution, the court considered the other factors. It determined that SEPA's management hunt failed to meet two additional criteria for derogation under 16.1(e): it was not adequately selective and limited and there were not sufficient limits on the number of animals to be taken.

SEPA had decided that two wolves from each of eight packs should be hunted, for a total of 16. The agency argued that to lessen inbreeding, the parent male or female should be killed, together with one of the half-grown cubs. This action would make it more likely that the surviving parent would reproduce with a less closely related partner. Despite this justification, SEPA did nothing to ascertain the parent in each pack. Similarly, although SEPA called for the hunt to be postponed upon the detection of a genetically valuable wolf in an area where hunting was authorized, the agency made no inventory of these wolves' location before the hunt commenced. Finally, although killing a parent wolf could lead to a decrease in inbreeding, killing a second wolf from each pack would not contribute to this goal. This measure would decrease the wolf population, not inbreeding. The court concluded that SEPA's hunting season was not selective enough.

The court next addressed whether killing 16 out of an estimated 230-270, or 5.9-7%, constituted a "limited" number according to the meaning of 16.1(e). The court declared that the text of the directive did not clearly define this. Looking for other sources of guidance, the court examined the European Commission's June 2011 reason opinion, which criticized Sweden's 2010 and 2011 hunting seasons. According to the court, those seasons had respectively allowed the license hunting of 12.9-14.2% and 9.6-10.5% of the wolf populations. License hunting had been responsible for the majority of wolf mortality. The Commission concluded that these hunts did not meet the requirements of a limited hunt. While the percentages of wolves killed during the 2013 hunting season would have been considerably lower both in relation to the total number of wolves in Sweden and in relation to the number of total wolf fatalities, the court found that they were still too high. The conditions for a "limited number" and "limited extent" were not met. Given

³⁴ The 'Junsele she-wolf' was translocated for the fourth time in March (SEPA decision 2013-03-08 in Case NV-02492-13), but is today – once again – back to the same area.

these failures to meet the criteria for derogation according to 16.1(e), the court found the hunting decision to be unacceptable.

SEPA has appealed this judgment to the Stockholm Administrative Court of Appeal. To date, the agency has not specified its reasons for doing so.

Controversial issues

Introduction

A number of interesting issues connected to wolf policy have arisen upon which we can address only briefly here. The first is political, and poses the general question of whether the Union should deal with species protection at all. From the point of view of traditional European law, with its focus on free trade and competition, this might be surprising. In contrast, from an environmental law perspective, it is quite obvious that the Union deals with the common natural resources of Europe, especially since species protection truly is a trans-border issue. However, for the purposes of this article, suffice it to say that Union law has regulated these issues since the late 1970s and no Member State today challenges that position. One must also remember that the nature conservation directives are expressing the basic requirements of the Bern Convention, which both the EU and its Member States have signed.

A set ceiling for wolves in Sweden is another political question.³⁵ There is consensus between all parties involved that the wolf population in Sweden/Norway does not have favourable conservation status, even though there seems to be disagreement on the precise meaning of the concept.³⁶ There is also common understanding that the long-term viability of the population depends both on the expansion of the genetic base and the size of the population. However, the number of wolves needed to gain favourable conservation status is highly debated. Most natural scientists seem to agree that it must be at least 500 animals in Scandinavia if the population is isolated. SEPA calculated in October 2012 that 380 is the scientific reference population value with a certain level of immigration. The Minister of the environment, on her hand, said the very same day that 180 would suffice, presupposing an even larger immigration and translocation of wolves.³⁷ Be

³⁵ It is worth mentioning, however, that the nature scientific researchers are quite divided on the effects of the new wolf policy on the long-term survival of the species in the region. The government relies heavily on researchers from Grimsö/SLU, whereas the Species Information Centre – also under SLU – openly criticises the policy. Accordingly, when the university delivered its comments on the Commission's formal notice in the remit to the Government, it failed to reach a unanimous decision (see SLU opinion 2011-02-28 (dnr. SLU.ua.Fe.2011.1.2-333), compared with the opinion of the Species Information Centre, see footnote 4).

³⁶ See the letter from four ecological researchers on SLU/Grimsö (Chapron, López-Bao, Kjellander, Karlsson) to Science that was posted in the March issue under the heading Misuse of Scientific Data in Wolf Policy (29 March 2013, Vol. 339 no. 6127 p. 1521). In an interview with the Swedish National Radio, however, the Grimsö researchers were dismissed by Olof Liberg, coordinator at Scandulv and in many ways the man behind the Government's wolf policy. Here, Liberg further stated that "FCS is not an ecological concept, but a political. No one knows precisely what it means".

<http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5489633>. To add to the confusion, this statement may be compared with a press release that the Government made the day before in the journal of the Swedish Hunters' Association, Svensk Jakt. Here, it was clarified that FCS is not "a political decision, but a scientific figure that the expert authorities will calculate" (<http://www.jagareforbundet.se/svenskjakt/Nyheter/Nyheter/2013/03/Miljoministern-talar-for-regeringen-1.46588>).

³⁷ <http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=5315881>

that as it may, unless the wolf policy in our neighbouring country to the west does not change drastically over the coming years, a substantial part of that population must reside in Sweden.³⁸

In addition, some brief remarks should be made on public acceptance of the wolf population. As mentioned above, a main feature of Government advocacy for its wolf policy has been that it would increase acceptance for the population. While this is not currently the Government's main argument, it continues to be relied upon. In fact, there seem to be diverging opinions on this issue among the political scientists. The Government cites certain studies to support its view, whereas the Commission interprets those same studies to support the opposite position. Additionally, the Commission highlights other investigations, showing unchanged or decreased social acceptance for the wolf presence. Also, among some of the hunters – regarded as key players in this area – acceptance seems to have declined after the renewed hunting decision in December 2010. The reason for this, according to some hunters, was that the number of wolves to be hunted had been set too low. On the other hand, according to recent studies, poaching seems to have decreased quite sharply, which the Government uses as an argument in support of its policy. However, the decrease started in 2005, which was significantly before the beginning of the policy to allow license hunting. This is a controversial and complicated issue about which, as legal researchers, we hold no firm position, other than that it seems difficult for the Government to actually prove its case. From this standpoint however, we find it somewhat surprising that the statement by the Large Carnivore Initiative for Europe (LCIE) expressed support for the Government's position on this matter. To our knowledge, most members of that network were, at that time, ecologists and other kinds of nature scientists and could hardly be described as experts on social or legal issues. Furthermore, the statement was silent both on who made the findings and on their scientific basis. Accordingly, as long as the LCIE does not reveal such information, the statement should be regarded as a loose opinion. The poorly explained conclusion on the wolf policy's compliance with the Habitats Directive reinforces that impression.

Finally, we have some brief observations on the issue of a wolf population in the reindeer herding areas. This region consists of almost 50 % of the country, divided in the all-year-round areas and the winter grazing areas. The Government claims that the same rules for protective hunting apply here, comparable to all other regions of the country. We would regard that as merely a play on words, since nearly all wolves to have entered this region have been dispatched with quite quickly, either by poaching or protective hunting. As a matter of fact, only five wolves in some 30 years have managed to get across this area. Furthermore, Sweden has not – in contrast with Finland – made any exemption for the strict protection of the species in the reindeer herding areas when Sweden entered the Union in 1995. On the other hand, the Government has a strong argument at its disposal in its claiming that the cultural economy of the Sami people must be protected according to international and Union law. Sweden has international obligations to re-

³⁸ Only 30 wolves (three reproductions) are allowed to reside in Norway. The country made a reservation to the Habitats Directive, mainly because of the wolf issue and conflict with the widespread sheep farming. Norway is still a party to the Bern Convention, but owing to weak compliance mechanisms Norwegians are not hampered in their keeping down the species to the limits of existence. Our understanding of the latest agreement between the major parties in the Norwegian Parliament, is that the current wolf policy is to be continued, see <http://www.nationen.no/2011/06/16/rovdyr/rovviltforlik/stortinget/rovdyrforlik/6703921/>

spect the cultural heritage of indigenous peoples, including their traditional ways of making a living. Such obligations are found both in Article 27 of the UN's International Covenant on Political and Civil Rights of 1966 and the Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007. At European level, the cultural heritage of the Sami people is also protected, both within the European Council and the European Union. The EU's Foreign Council Meetings have repeatedly stated that the national policies for utilising natural resources in Arctic areas must be decided in close cooperation with the Sami. Even though reindeer herders have since 2001 been paid for the hosting of wolves or reproductions,³⁹ the economic and other burdens from predation seem to exceed by far the advantages. We would suggest that this is a true conflict of interest, and not easily resolved.

The general criteria in Article 16.1

First of all, it should be noted that the infringement case against Sweden on the wolf policy only concerns the understanding of Article 16.1(e). In the Swedish hunting legislation, the yearly culling of the wolf population is called 'license hunting'. Since the underlying reason for hunting is the management of the species, we think it more accurate to use the term 'management hunting'.

From this point of departure, it is clear that the precedential value of the Finnish wolf case is limited. That case concerned protective hunting, as evidenced by the action brought by the Commission and by the reference in the judgment to the legislative background, where only Article 16.1(a)-(c) is mentioned. Article 16.1(e) is not touched upon in that case, at least not explicitly. However, there are some statements from the CJEU having general applicability for all of Article 16.1. First, the Court reiterated what had been said in many cases concerning the two nature conservation directives, namely that the derogation possibilities provide '*exceptional arrangements which must be interpreted strictly*'. It accordingly lies with the deciding authority to prove that the necessary conditions are present for each derogation, with a clear and sufficient statement of reasons in accordance with Article 16.1 for any decisions taken.⁴⁰ Second, the above mentioned statement by the Court in para. 29 of the judgment also appears to have general applicability. According to the Court, all of the derogation possibilities in the article can be utilised only if it is *duly established* that the conservation status of the species will *not be worsened* or such derogation *does not prevent the restoration of a favourable status*. But – and this is crucial to the discussion – in addition, all other criteria for derogation must apply in each individual case, both the ones in the introduction to Article 16.1 and those under derogation ground e). Accordingly, there must be *no satisfactory alternative solutions* and the taking of the species must be done *under strictly supervised conditions*, on a *selective basis and to a limited extent*. However, let us begin with the general derogation criteria in Article 16.1.

The first of those – *the effect on conservation status* – is purely ecological, a subject about which we can have no advanced opinion. We therefore leave it to readers to compare the arguments of the Commission, the Swedish Government and the NGOs. One should note, however, that according to the CJEU, the effect on conservation status must be 'duly established' before any derogation can be decided. In the Finnish wolf case, the

³⁹ Viltskadeförordningen (2001:724).

⁴⁰ Judgment para 25, with reference to C-60/05 *WWF Italia and Others*, para 34.

Court referred to paragraph 47-51 in the Commission's Guidance Document 2007, the final sentence of which may be cited: 'The net result of a derogation should be neutral or positive for a species'.⁴¹

Something similar can be said about the second issue, whether there are *alternative solutions to the problem*. The Government's aim for the management hunts in 2010 and 2011 was to gain public acceptance for the wolf population in rural areas, especially among those who suffer from wolf predation. We think it is quite obvious that there are alternatives that have less negative impact on the wolves. Local acceptance can be increased by measures such as technical assistance and support for specific stakeholders (for example, livestock breeders), including better compensation schemes and preventive measures.

In the 2013 decision, SEPA toned down its emphasis on social acceptance for wolves as a justification for derogation. Instead, it focused on the claim that hunting would contribute to the genetic improvement of the wolf population, that it even is the only measure that can lead to such improvement in the short run. This line of argumentation does not, however, seem to make license hunting more acceptable under Article 16.1. To begin with, it is very controversial amongst conservation biologists whether hunting is an appropriate method to improve the genetics of a species. There are also researchers who have found that the two earlier hunts have in fact worsened the population's long term chances of survival. Secondly, the argument that a hunting season is "the only way" to improve the situation in the short run is hardly relevant, because improving the genetic health of a population is a long term project. It should also be noted that at the time of the decision, SEPA had not had a single success in that regard.⁴² Also, the Government has made the permission of landowners and hunting rights holders a prerequisite both to translocation of mature wolves and the placing of zoo-raised wolf pups in existing wolf dens in the wild. In the prevailing debate climate, this makes translocation difficult and questionable whether the latter measure will ever be carried out.⁴³ Indeed, it is hard to understand the Government's new justifications as anything other than a pretext, the true aim still being to satisfy the hunters and farmers who continue to demand the hunting of wolves. Had the true intention been improving the genetic health of the wolf population, obviously the measures would have been taken in the opposite order—first measures to introduce unrelated wolves, then the culling of selected individuals or packs.

The specific derogation grounds under Article 16.1(e)

As already noted, in addition to the general derogation criteria, according to the grounds under (e), the taking of the species must be done *under strictly supervised conditions*, on a *selective basis and to a limited extent*. We address those criteria one by one.

The first criterion concerns whether the hunting is being subjected to *strictly supervised conditions*. Considering the 2010 and 2011 hunts, the Commission did not think so, calling the conduct reminiscent of the Wild West. The Government, for its part, has

⁴¹ Guidance Document 2007 page 62.

⁴² To this date, only one translocation of mature wolves has succeeded and this was in March this year (SEPA decision 2013-03-06 (Case NV-01967-13) concerning a wolf couple from Tornedalen in the Northern part of the country).

⁴³ For the third year in a row, SEPA recently (2013-05-21) announced that the placing of wolf pups from zoos into existing wolf packs will not be undertaken this breeding season, due to differences in birth periods.

claimed that the hunts were well organised and efficiently operated. At least with regards to the 2013 decision, the Government's argument was accepted by the administrative court, at least with some reluctance. However, one must note the differences between the two first hunts and the one that was undertaken 2013. This year, only those with hunting rights within specified wolf territories were allowed to take part. We also agree with the court in that the hunt preferable should have been carried out by professionals assigned by the county boards. Such a system only requires a minor change in the Hunting Ordinance.

The next criterion is the requirement that taking should be conducted *on a selective basis and to a limited extent*. In the infringement case, the Commission considers that the hunts of 2010 and 2011 were not 'selective' as it applied to all packs, except those expressly exempted. The Government asserted that the hunt was selective, since it was limited to five counties and the territories of genetically valuable individuals from Finland and their first generation descendants were exempt from the hunt. This line of argument was for obvious reasons emphasised in the 2013 decision, where eight packs were targeted and the hunting of both parent wolves "should be avoided". As noted, the administrative court did not accept this, as there had not been any measures taken to make certain that both parent wolves were not shot and the conditions in the decision were loosely formulated. In our opinion, the main concern is instead that the hunt was organized in a way that even inexperienced hunters were involved. In doing so, the risk of killing the "wrong wolf" became imminent, as it requires long experience to differ between wolf cubs and mature individuals. In this respect, the decision in fact seems to have been ill thought out, without the carefulness and exactitude that is required from the Habitat Directive.

The final express criterion concerns whether the *number* of hunted animals is *limited*. In the communications with the Government concerning 2010 and 2011 hunts, the Commission claims that a total bag limit of 28 out of approximately 200 animals – constituting more than 15 per cent of the population – could not fall under the criterion of 'limited number'. It also highlighted the fact that the 2010 hunt was by far the major cause of mortality for wolves in Sweden during that period and a disproportionate number of animals were killed under the derogation based upon Article 16.1(e), as compared with that in Article 16.1(b). Referring to the case law under the Birds Directive, the Commission furthermore contended that the similar expression found in Article 9 of 'small numbers', has been interpreted as meaning one per cent of the total annual mortality rate.⁴⁴ Finally, the Commission asserted that whereas Article 16.1(e) is the last of the listed derogation grounds, and the only one which is limited as to numbers, speaks in favour of a very restrictive approach regarding the number of specimens that can be taken. The Government, not surprisingly, argued that 28/19 animals was still a limited number in relation to all wolves killed and that comparison with birds was invalid.

This was the criterion that the Stockholm Administrative Court scrutinized most thoroughly in its 2013 judgement and also one of the main reasons for quashing the SEPA decision. With reference to the cases C-344/03 and C-60/05, it found that some guidance could be found in the Birds Directive, where the similar criterion in Article 9(1)(c) uses the term "small numbers". Thus, when deciding this issue, account should be taken of the various criteria which relate to geographic, climatic, environmental and biological factors

⁴⁴ C-344/03 para 53-54.

and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes. Moreover, the administrative court made a comparison to the Finnish wolf case, where the increasing population of wolves was taken as evidence to show that the derogation should be allowed. The court further stated that the situation was similar for the Swedish population during the period 2009-2013. It also noted that, during the license hunts of 2010 and 2011, almost 12 % and 7 % of the population were killed, constituting almost to half the total death rate those years. In comparison with these numbers, corresponding figures for the 2013 hunt – if undertaken to the full extent – would have been almost 7 % of the population, which the court found too high.

In this, we agree with the court. In view of the case law of CJEU, almost 7 % of the population cannot be regarded as a limited number. Moreover, the fact that the total number of wolves remains unchanged does not in itself mean that the amount of animals killed is limited.⁴⁵ What is more, the Government's argument that this is only a minor part of the total annual mortality of the Swedish wolf population might prove to be counter-productive. This statement seems to be founded on the assumption that the rest of the mortality over which the Government has control – that is, protective hunting under Article 16.1(b) – is kept at a high level. In our view, this is wholly controversial. It is a fact that, recent years, the authorities have been exploiting the possibility for allowing protective hunting somewhat extensively. This resulted in 2010 in a new administrative practice to allow such taking when wolves in an area have preyed on unleashed hunting dogs.⁴⁶

In summary, with regard to the criterion on 'limited extent', there are strong arguments against the Government's viewpoint. One may also take note of the fact that Section 23c and 23d of the Hunting Ordinance on license hunting do not express this restriction. Still, we do not think that this issue alone is decisive of the matter as to whether Sweden's wolf policy complies with Union law. The issue that really illustrates the conflict between a system of strict protection of the species according to the Habitats Directive and management hunting is the *purpose of the measures* that the Government has pursued.

Purpose of the Habitats Directive

Having elaborated upon the criteria of Article 16.1 in light of the arguments of the Commission and the Swedish Government, one might conclude that there is no strong indication on how the CJEU would judge the matter. We are of the opinion that it is mainly the satisfactory alternative criterion and the 'limited numbers' criterion in Article 16.1(e) that clearly are incompatible with the Swedish system of management hunting. However, scrutinising arguments and adding the results in this way – a typical and traditional technique adopted by lawyers – sometimes makes it difficult to explain why the final outcome seems to be inadequate, or even strange. We believe the reason for this is that in being too technical in trying to find the true meaning of a law, there is an attendant risk of going astray and missing its main point. And, as always when it comes to Union law, the main point is the purpose of the legislation. One must also understand a provision in the context of the system of which it forms a part. Favouring that perspective, we think the answer to the central question of this paper becomes clear: the purpose of Article 16.1(e)

⁴⁵ C-103/00 *Caretta caretta*.

⁴⁶ See Darpö, J: Brussels Advocates Swedish Grey Wolves (SIEPS Policy Analysis 2011:8; www.jandarpö.se/ In English), p. 12.

is not to allow management hunting. All the criteria in the provision assume some other aim and purpose; it becomes a typical ‘last resort’ derogation possibility after everything else has been made use of. Its application is intended to be quite exceptional.⁴⁷

The idea of giving Article 16.1(e) such a broad meaning as to allow management hunting in this country originally came from the Government’s Commission on Large Carnivores in 2007 (SOU 2007:89). A reading of the report does not make clear how the Commission reached its findings. During the remit procedure strong arguments were advanced opposing this conclusion, but the Government ignored them. In the proposal to Parliament, the legislation was based upon the assumption that Article 16.1(e) allows for management hunting of the wolf, and no further arguments were added. However, in the European Commission’s Guidance Document of February 2007 on the strict protection of species under the Habitats Directive, one can actually find similar reasoning concerning the Latvian lynx population and its management plans.⁴⁸ Here, the Commission stated that the limited and strictly controlled taking by hunters, according to management plans, was clearly in line with the Habitats Directive, since this would have a positive effect on the population and on public perception. It is quite possible that the Swedish legislature found inspiration here. However, in our belief, this comparison does not hold good because the situations of the two populations are completely different. The Latvian lynx population has had its best distribution in 150 years and is considered to have a favourable conservation status. As emphasised above, this is clearly not the case with the Scandinavian wolf. One can also question the conclusion in the Guidance Document, which seems to have little connection with both the wording of the provision and the purpose of the regulation. We think the Commission here has tried to find an ‘innovative’ solution to the inflexibility contained in the Habitats Directive and the bureaucratic problem of transferring a species from one Annex to another. Some species in some countries ought not to be in Annex IV for strict protection, but instead in Annex V for those which may be subject to management measures. Be that as it may, the Guidance Document’s value as a source of Union law depends on whether or not the CJEU confirms it. So far there is nothing in the Court’s case law that confirms this understanding of the derogation possibilities under Article 16.1(e).

There is still another argument relating to the purpose of the Habitats Directive that requires comment. It is clear from Article 2.3 that the Directive’s central goal is to protect listed species, taking into account ‘economic, social and cultural requirements and regional and local characteristics’. The Government has asserted two main defences for the wolf policy. First, the genetic: keeping the population low facilitates the possibility for genetic improvement. Our understanding is that this standpoint is ecologically very controversial. Second is the improvement of public acceptance for the existence wolves, which is crucial for the long-term survival of the population. On the face of Article 2, one might argue that this is *also one aspect of the purpose* of the Directive. In our view, however, the wording about taking into account other interests merely expresses the proportionality principle in relation to the strict protection of species. The Member States are here reminded of the necessity of applying those measures best suited to economic, social, cultural and geographical contexts. As with any use of the proportionality principle, it expresses the means of reaching the goal without changing it as such. Accordingly, Ar-

⁴⁷ Guidance Document 2007, page 56.

⁴⁸ Guidance Document 2007, page 57f.

ticle 2.3 is not an autonomous ground for derogation that exists alongside those in Article 16.⁴⁹ Furthermore, the former provision cannot either be used to advocate the use of derogation possibilities in Article 16.1 for purposes other than those described therein and in ways that contravene the biological purposes of the Habitats Directive. Or, as the Commission expresses it, ‘(a)pplying proportionality does not overrule or marginalise any of the conditions applying to the derogation scheme but can adapt their application in the light of the overall objective of the Directive’.⁵⁰

This discussion about the purpose of the Directive also touches upon the issue where we think that Stockholm Administrative Court should be criticised. On most points in the case about the encounter between the Habitats Directive and the Swedish hunting legislation – which really is quite complicated even for those who are familiar with its labyrinths – the court navigates very well among the arguments of the parties. But on this basic issue, the reasoning of the court was too narrow. Accordingly, the most interesting question was never answered in the case; are the reasons for Swedish management hunting permissible under Article 16.1(e) at all? The administrative court answered this question affirmative, referring to the *Finnish wolf case*. As noted above, we are clearly of an opposite opinion, as that case does not give guidance for the derogation grounds under (e). Accordingly, we have little understanding of why the court did not requested CJEU for an answer, considering that time was not an issue since the hunting season was over.

Closing remarks

The reactions on the administrative court’s quashing the SEPA decision on license hunting from the hunters’ associations and some politicians from those parties who are in power have been fierce. According to the interviews that have been undertaken by Svensk Jakt – the journal of the Swedish Hunters’ Association – some of the politicians openly expresses discontent with the courts which are “hindering us from maintaining effective management of the wolf population”. Others criticize the NGOs as being irresponsible as they “block the politicians from doing the necessary weighing of interests in the matter”.⁵¹ The minister of rural affairs states that he thinks that the wolf issue “should not be decided in Brussels”.⁵²

For us who still believe in the rule of law and that Sweden should remain as a member to the Union, the recent development on the wolf issue is welcome. After years of decision making behind closed doors, finally the application of law can be challenged in court. It is also worth pointing out that in all three cases in which NGOs have thus far been granted standing to challenge wolf hunting decisions, the court has found in their favour.⁵³ This fact undermines any argument that NGOs have acted in an irresponsible or obstructionist manner. Through their litigation, the Swedish wolf policy will ultimately come under the CJEU’s scrutiny. How abominable that may seem for some politicians, this may in the long run even be desirable from a political point of view. The Government clearly is of the opinion that the wolf hunt is consistent with EU law, and the Euro-

⁴⁹ C-247/85 *Com v. Belgium*, para 8.

⁵⁰ Guidance Document 2007, page 53.

⁵¹ Svensk Jakt 2013-05-03.

⁵² Svensk Jakt 2013-053-28.

⁵³ Stockholm Administrative Court 2013-05-28; 4655-13, 4691-13, 4700-13; Stockholm Administrative Court 2013-05-07; 2428-13; Stockholm Administrative Court 2013-02-20; 1321-13.

pean Commission has the opposite opinion. As shown above, the Government is also under intense pressure from those with the opinion – regardless of how representative it is – that SEPA and the Swedish politicians should stand up to the “bureaucrats in Brussels”. In this situation, it is desirable that the CJEU make a determination once and for all. In closing, we do in a way agree with the minister of rural affairs. The wolf issue should not be decided in Brussels. The day to day management issues should of course be decided on a Member State level. But ultimately, the legal requirements for derogation from the strict protection under Union law needs to be decided in Luxembourg.

Jan Darpö & Yaffa Epstein

Amendments 16 September 2014

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Footnote 1 (new or Afterword):

The text was submitted in May 2013. Since then, there have been several important developments in the national wolf policy. Based on a highly contested report from Skandulv in June 2013, the Parliament decided that the Swedish wolf population had reached favourable conservation status. The Government then assigned the EPA to take a decision on a license hunt for 2014, which it did two days later (NV 2013-12-19; NV-08512-13). The decision established a license hunt of 30 individuals in three counties, beginning in February 2104. The stated reason was to reduce social conflicts concerning the wolf population by culling a certain number of family groups in areas with dense wolf populations. As the genetic status in the population was improving and the numbers of wolves – at that time amounting to 300 individuals in Sweden and 50 in Norway – was increasing, EPA determined that the hunt would not impair the conservation status of the species. In this context, it should also be noted that EPA previously had decided on a favourable reference value of 270 wolves within the interval 170-270 that was set by the Parliament. Furthermore, EPA argued that the hunt, which would reduce the population by 7%, would actually improve the genetic status of the wolf population by encouraging interbreeding with translocated wolves from the Karelian region of Finland and Russia. However, the hunt was stopped by Stockholm Administrative Court before the decision took effect (Stockholm Administrative Court 2014-01-15; 30966-14 and 598-14). Thus, as of today, both the 2013 and 2014 decisions on license hunts are pending in the administrative courts. Concerning the former decision, the Stockholm Administrative Court of Appeal decided in June 2014 *not* to ask for a preliminary ruling from CJEU.

In reaction to the administrative courts' quashing of the hunting decisions, the Government also decided that the decision making regarding hunting should be delegated to the County Boards, thus making the EPA the final instance for appeal. As the Commission has stated previously in a communication in EU Pilot in late 2013, Member States must make it possible for decisions regarding hunting to be challenged in court, otherwise it would be in breach with the Aarhus Convention and the principle of useful effect (*effet utile*) of EU law. A new infringement case against Sweden was launched this summer (EU Commission, formal notice 2014-07-11; case 2014/2178).