
Thrown to the Wolves – Sweden Once Again Flouts EU Standards on Species Protection and Access to Justice

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Abstract

Controversy continues over the return of the wolf to the Swedish landscape. Decisions to allow the licensed hunting of Sweden's fragile wolf population in violation of the EU's Habitats Directive have repeatedly been quashed by the Swedish administrative courts. In response, the law was changed: it is no longer possible to appeal those decisions to the courts. This article examines the decision to make impossible the judicial review of Sweden's implementation of EU species protection law in light of the Aarhus Convention and in light of the EU law principles of useful effect and effective judicial protection. We conclude that while the access to justice requirements of the Aarhus Convention are likely fulfilled, the fact that Sweden's hunting decisions pursuant to the Habitats Directive are no longer reviewable by a court contravenes EU law.

Introduction

The return of the wolf to the Swedish landscape has generated seemingly endless controversy in Sweden, both in the media and in the courts. Licensed hunting seasons for wolves have been planned every year since 2010, except for 2012. In 2010 and 2011, the hunting seasons were decried by environmental non-governmental organizations (ENGOS), but their legal challenges were

dismissed for lack of standing. Following legal developments at the EU level and further legal challenges by Swedish ENGOS, injunctions were granted against the 2013 and 2014 hunting seasons, and they were eventually declared invalid by the Swedish administrative courts. Determined to permit licensed hunting whether or not legally justifiable, the Government changed the system for decision-making in order to disallow appeals to a court. If this change is allowed to stand, it will have the effect of not only removing hunting decisions from review by Sweden's judiciary, but also make it impossible for the CJEU to review Sweden's compliance with EU law through a preliminary ruling.

This article will examine the legal situation for Swedish wolves and analyse to what extent EU law prevents a Member State from evading judicial review of its application of EU environmental law.

Background

Decisions on licensed hunting 2009–2010 and 2013–2014

Wolves are listed in Annex IV of the Habitats Directive (92/43/EEC) and are therefore strictly protected according to its Article 12. Derogation from strict protection may only be made according to the requirements set out in Article 16.1. First, there must be no satisfactory alternative, and derogation must not be detrimental to the maintenance of populations of the species at fa-

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vourable conservation status (FCS). Additionally, one of five enumerated additional conditions must be met. The fifth of these, lettered e, is a catch-all provision worded as follows:

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.

It is under this last provision, as implemented in Swedish hunting law, that licensed hunting is allowed in Sweden. The Swedish environmental protection agency (SEPA) authorized hunting seasons both in early 2010 and again in early 2011 with a bag limit of 27 and 20 wolves respectively. Several environmental ENGOs appealed these decisions; however, the appeals were thrown out because the organisations were found not to have standing under Swedish law. The European Commission also objected, initiating an infringement proceeding against Sweden in January of 2011 on the grounds that the licensed hunting allowed by SEPA was neither sufficiently selective nor limited.¹ As a result of the Commission's action, no hunting season was held in 2012.

However, the pressure from the farmers' and hunters' organisations increased and despite the Commission's warnings, SEPA decided to allow a hunting season in early 2013, with a bag limit of 16 wolves. But in the meantime, CJEU's judgement in the Slovak Brown Bear case had begun to influence the jurisprudence of the Swedish administrative courts concerning hunting decisions. In that case, the CJEU ruled that national courts must, to the extent possible, interpret national procedural rules in such way so

¹ Reasoned opinion about the wolf hunt, European Commission 2011-06-17, case No 2010/4200, see www.jandarp.se/Övrigt material, however only available in Swedish.

as to allow ENGOs standing to appeal national implementation of EU environmental laws.² In the summer of 2012, Sweden's Supreme Administrative Court confirmed that the national standing laws must be interpreted to allow public interest lawsuits challenging administrative decisions made under hunting legislation if the same criteria for ENGO standing to appeal decisions made under Environmental Code are met: the association must have nature or environmental protection as its primary purpose, as well as be non-profit, have at least 100 members or otherwise be able to show that it has "support from the public", and have been active in Sweden for at least three years.³ Thus, when SEPA decided to allow licensed hunting in 2013, the ENGOs were able to appeal. The Stockholm Administrative Court of Appeals granted an injunction, and later ruled that – as the Commission had earlier argued in its reasoned opinion – the hunt was neither sufficiently selective nor limited to meet the requirements of the Habitats Directive's narrow derogation allowances of Article 16.1(e).⁴

In the month following the administrative court's decision, June of 2013, a letter from a number of the researchers at Skandulv – the Scandinavian wolf research project – claimed that the Scandinavian wolf population had reached FCS. This conclusion was based on the claim that the number of wolves was estimated to have reached 300 in Sweden and 30 in Norway, and that their genetic status had been improved by the successful relocation of one pair of wolves from the north of Sweden to central part of the country. The Government concluded that FCS was in-

² C-240/09 *Slovak Brown Bear* (2011), p. 51.

³ The *Kynna wolf case*; Supreme Administrative Court, decision 2012-06-28 in case No 2687-12 and Stockholm Administrative Court of Appeal, judgment 2013-02-07 in case No 4390-12).

⁴ Stockholm Administrative Court of Appeal, decision 2013-02-06 in case No 746-13 and judgment 2014-11-14 in case No 3273-13.

deed reached, and that a favourable reference population value (FRP) for the wolf should be set between 170 and 270 wolves. SEPA exercised its discretion to set the FRP within that range, choosing the maximum of 270 wolves, which was reported to the Commission in the end of the year according to Article 17 of the Habitats Directive.⁵ Thereafter, SEPA authorized a hunting season with a bag limit of 30 wolves to begin in February 2014. This hunt was to be “limited and controlled” and targeted at reducing the wolf population in those counties that had the most wolves. SEPA’s decision allowed the affected counties to decide in which wolf territories hunting would take place, with the restriction that particularly genetically valuable wolves should not be killed. According to SEPA, the licensed hunting season would contribute to the general public’s increased tolerance for wolves and other carnivores, thus benefiting the affected species. Environmental organizations balked at this explanation and once again appealed the hunting decision. The Stockholm Administrative Court granted an injunction, effectively putting an end to the 2014 hunting season before it began. Its judgement came in the end of the year, confirming that the hunt was in breach with the Habitats Directive.⁶ The court did not agree with SEPA that the directive allows for measures aiming at “lowering the density of the wolf population”, but accepted the aim “reduce the socio-economic consequences” of the existence of wolves. However, it did not find that the licensed hunt was a useful means of obtaining such an effect, nor did it find any good reasons for why the chosen wolf territories were suitable for that purpose. In ad-

dition, the court argued that a hunting bag limit of 30 animals could not be regarded as “a limited number”. Accordingly, SEPA’s decision was found disproportionate in relation to its stated aim and was quashed.

The 2015 licensed hunting season

Unsurprisingly, farming and hunting organizations opposed the courts’ new ability to injunct and annul hunting decisions that did not comply with EU law, decrying the court’s actions as a “circus” and threat to democracy. More surprisingly, the Government – with the support from a majority in the Parliament – also reacted against ENGO standing with a proposal that made hunting decisions non-appealable in court. This proposal would move decision-making authority from SEPA to the country administrative boards (CABs). Under Swedish law, decisions made by CABs are appealable only to SEPA, but no further, whereas decisions originally made by SEPA can be appealed to the administrative courts. In response, the Commission opened a second infringement proceeding against Sweden in July of 2014, arguing that a system in which hunting decisions cannot be appealed in court contravened both the Aarhus Convention and the principle of useful effect (*effet utile*) with regards to the Habitats Directive.⁷

The Swedish Government nevertheless decided to go forward with its plan to delegate responsibility for hunting decisions to the CABs. In October, SEPA released its new national management plan for wolves for 2014–2019. This plan divided Sweden into three administrative districts. Within the central administrative district, which hosts the majority of Sweden’s wolves, hunting

⁵ One year earlier, in the fall of 2012, SEPA reported 380 animals as FRP to the Commission, to which the Minister of the Environment, Lena Ek, immediately responded in media that a number of 180 was sufficient.

⁶ Stockholms Administrative Court, judgement 2014-12-23 in the cases No 30966-13 and 598-14.

⁷ Formal notice about judicial review of hunting decisions, European Commission 2014-07-01, case No 2014/2178, see www.jandarpö.se /Övrigt material, however only available in Swedish.

decisions would be made by the CABs.⁸ Each county would decide how many wolves could be killed, so long as the decision complied with the Swedish hunting regulation.

Three CABs approved licensed hunting seasons to begin early 2015. The first two of these, Värmland and Örebro, allowed for bag limits of 24 and 12 wolves, respectively. As required by the hunting regulation, they enumerated justifications for their decisions, which included protecting livestock and elk, and enabling the Swedish tradition of using off-leash hunting dogs. They also noted the potential for improving the public attitude towards wolves themselves, as SEPA had previously argued. They further argued that hunting was the most appropriate solution, because moving the wolves away from human inhabited areas would be prohibitively expensive. A third county, Dalarna, authorized the hunting of 8 wolves, using the justification that wolves in the vicinity of inhabited areas caused unease, and thus were a threat to public health (as permitted by Article 16.1(c) of the Habitats Directive). However, this decision was rejected by SEPA on appeal. Dalarna issued a new decision, again permitting the hunting of 8 wolves, this time mirroring the justifications used by the other CABs.

The decisions from Värmland, Örebro and Dalarna were appealed by the ENGOS to SEPA. As the decisions complied with the national wolf plan, SEPA affirmed them. Despite the ban on appeals, the ENGOS challenged SEPAs decisions at the administrative court. The Karlstad Administrative Court enjoined the decisions, as it found it doubtful that the ban was in line with EU law. The Värmland and Örebro CABs and the hunters' associations appealed to the Göteborg Administrative Court of Appeals, which

accepted the ban on judicial review of hunting decisions on the grounds that "there does not exist any EU law principle that goes beyond what is granted the public concerned according to the Aarhus Convention".⁹ This decision was in turn appealed by the ENGOS to the Supreme Administrative Court, which granted leave to appeal on the question of whether the ban is in breach with EU law. However, the court did not injunct the hunt and, by the end of January, a total of 42 wolves were shot in the three counties. This is significantly more than in any year prior.

Controversial issues

Licensed hunting under Article 16.1(e) Habitats Directive

The Swedish hunting regulation's provisions regarding under what conditions licensed hunting may be allowed are based on the Habitat Directive's Article 16.1(e) and state that licensed hunting may be allowed if there is no other satisfactory solution and it will not be detrimental to the maintenance of the species' conservation status. Further, the hunt must be appropriate, considering the population's size and composition, and must proceed selectively and under strictly controlled conditions.¹⁰

The question whether licensed hunting is allowed under Article 16.1(e) has proved controversial in many countries with a substantial wolf population, not least in those Member States where the species is rather recently re-established. We have debated this issue in other articles and will not develop it further here.¹¹

⁹ Göteborg Administrative Court of Appeals, judgement 2015-01-15 in cases No 129-15 and 130/15.

¹⁰ Hunting Regulation 1987:905 sections 23c and 23d.

¹¹ See Darpö, J: *Brussels Advocates Swedish Grey Wolves*. (SIEPS Policy Analysis 2011:8) and Epstein, Y & Darpö, J: *The Wild Has No Words* (JEEPL 2013 p. 250), both available on www.jandarpo.se/In English. See also Epstein, Y: *Population-Based Species Management across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf*

⁸ Nationell förvaltningsplan för varg. Förvaltningsperioden 2014–2019 (December 2014).

Some short remarks are nevertheless useful. The Swedish debate on licensed hunting has largely focused on how many wolves there are in Sweden. However, genetic considerations may be even more important. Until 2013, there had been a common understanding that the wolf population had not reached FCS according to the Habitats Directive. The main reason for this was that the population was quite inbred due to a lack of connectivity with neighbouring populations. In the fall of 2013, the Government, relying on the aforementioned Skandulv letter, announced that the population had reached FCS. It's beyond our area of expertise to enter into this discussion about the genetic status of the wolf population, but it should be noted that the Skandulv letter has been called into question by others in the scientific community. Among other objections, it was criticized on the grounds that Skandulv's conclusions were based on the assumptions that migrant wolves that had not reproduced in Sweden would do so and thus contribute to genetic diversity in the Scandinavian wolf population. Further, Skandulv's report discussed what numbers of migrant wolves and total population were needed to maintain a population that was already at FCS, not those needed to reach FCS. The most recent evaluation from SEPA found that the Scandinavian wolf population needs at least 2,5 immigrants per five-year period (a wolf generation) and a total of 270 wolves in order to reach and maintain FCS. We are currently not even close to the necessary immigration rate.¹² Therefore, the key issue when considering whether FCS is reached is the genetic status of

in Scandinavia. (Georgetown International Environmental Law Review 25:4 2013 p. 549).

¹² This assumption is made in the national wolf plan and is based on a report from Michael Bruford, professor of ecology at Cardiff School of Biosciences. If the number of wolves in the Scandinavian population is instead 370 wolves, the rate of immigration of 1 animal per wolf generation suffices.

the wolf population rather than the number of animals in Scandinavia.

As noted, the Swedish regulation on licensed hunting largely mirrors the wording of Article 16.1(e), with one significant exception. Instead of "limited extent" and "limited numbers", it uses the term "appropriate, considering the population's size and composition". One can therefore question the formal implementation of that provision of the Habitats Directive, especially as it pertains to derogation from a strict protection scheme which must be interpreted narrowly.¹³ Even so, the controversy mainly concerns when derogation from strict protection is actually allowed. Licensed hunting in Sweden is essentially a type of management hunting, which is often considered not to be allowed for species that are strictly protected under the Habitats Directive, rather this is regarded as something that can only be done to Annex V species according to Article 14. The legal basis for licensed hunting of wolves in Sweden can therefore be regarded as weak. Indeed, support for the position that management hunting of strictly protected species may be allowed in limited circumstances can nevertheless be found in the guidelines of the network Large Carnivores Initiative of Europe (LCIE) from 2008.¹⁴ However, although it is true that those guidelines constitute "best practices" on a general level according to the EU Commission,¹⁵ this cannot be said about everything that is written in the document. The LCIE guidelines are often referenced in the wolf debate as they suggest the possibility of management hunting of strictly

¹³ C-342/05 *Finnish wolf case*, p. 25.

¹⁴ Guidelines for Population Level Management Plans for Large Carnivores in Europe. A Large Carnivore Initiative for Europe report prepared for the European Commission. Ed. Linell & Salvatori & Boitani L. Final version July 2008, see pages 28 and 31.

¹⁵ European Commission, Note to the Guidelines for population level management plans for large carnivores (2008).

protected species, irrespective of whether FCS of the population is reached or not. However, from a legal perspective, there are also strong arguments for the opposite position, i.e. that management hunting is not allowed for strictly protected species, especially if the population does not have FCS.

One argument for this opposite conclusion is that the Commission has not followed LCIEs guidance in this respect in its infringement case against Sweden, despite the active involvement of the network in the case.¹⁶ Another is the fact that SEPA's hunting decisions for 2013 and 2014, which were expressly based on the LCIE guidance, all were quashed by the Swedish administrative courts. In doing so, the Stockholm Administrative Court of Appeals explicitly questioned whether management hunting was acceptable for a strictly protected species. Furthermore, the CJEU, which is of course the ultimate interpreter of EU law, has not yet announced its position on the matter. This is vital to note in any sound legal analysis, as guidance documents and even decisions from the Commission are only "soft instruments" of EU law and can never replace the statements from the court in Luxembourg.¹⁷ It would not be very surprising, however, if the CJEU disallowed management hunting of strictly protected species outright, as such hunting

counters the general scheme and purpose of the Habitats Directive. The fear that the CJEU would reach this conclusion is probably one of the main reasons why the Swedish authorities who currently authorize such hunting – both SEPA and the CABs – are opposed to the idea of the national courts seeking a preliminary ruling on the matter. A Swedish court may nevertheless refer the question to the CJEU, as the judgement from the Stockholm Administrative Court to quash the 2014 licensed hunt has been appealed by the SEPA. Although the Administrative Court of Appeals is not legally obliged to ask for a preliminary ruling, they still have the opportunity, and the resulting legal certainty would surely be welcomed by all who are currently grappling with this issue. It is, however, more probable that such a request will be made from our neighbours in the east. In the beginning of 2015, Finland held a licensed hunt of 17 wolves, out of a population of half the size of the Swedish.¹⁸ In contrast with our system, those decisions are appealable to the administrative courts and some cases have already been processed in the first instances. As the Finnish system for judicial review is so much faster than the Swedish, the Supreme Administrative Court in Helsinki will soon have to take a stand on whether licensed hunting of a strictly protected species is allowed under Article 16.1 of the Habitats Directive. If the answer is not clear, they are, in contrast with Stockholm Administrative Court of Appeals, obliged according to Article 267 TFEU to ask for a preliminary ruling from the CJEU.

Access to justice and the Aarhus Convention

Both Sweden and the EU are signatories to the Aarhus Convention. This convention aims to improve the democratic legitimacy of decision-

¹⁶ The chair of the LCIE, Luigi Boitani, wrote to the Swedish Government in December 2010 and February 2011, expressing his support for the licensed hunt, as it could be based on all of the derogation grounds in Article 16.1. At that time, the network did not have any member with a legal background.

¹⁷ This is something that also the Commission emphasizes in different communications, see for example reasoned opinion 2011-10-28 in infringement case No 2006/4643 against Sweden concerning the implementation of the Water Framework Directive (paras 32–33, 38, 52, 54, 57 and 64). Here, the Commission states that its own guidelines can only contribute to the understanding of an EU law provision when it is not possible to reach a conclusion about its purpose through literal, historic or systematic interpretations.

¹⁸ A quota of 29 wolves was set by the Government, whereafter the Finnish Wildlife Centre awarded permits for 24 wolves and 17 were shot.

making in environmental matters through providing access to information about environmental issues, the opportunity to participate in the decision-making itself and access to legal procedures to appeal decisions concerning the environment. The Convention's provisions on access to legal remedies are contained in its Article 9. According to Article 9.2, the public concerned has a right to appeal permitting decisions for certain larger activities, which are listed in an appendix, as well as other activities that have a "significant effect" on the environment. Further, Article 9.3 states that members of the public must be able to challenge acts or omissions of public authorities and private persons that violate national environmental laws, either in court or in administrative proceedings. Article 9.4 requires that legal remedies must be adequate, effective, fair, equitable, timely and not prohibitively expensive.

In its formal notice from July 2014, the Commission argued that a system in which hunting decisions cannot be appealed to a court violates Article 9.3 of the Aarhus Convention. The Government disputed the Commission's claims, responding that the system of decision-making by the CABs with the possibility of appeal to SEPA meets the requirement to provide a system for appeals because both were independent administrative bodies. Thus, according to the Government, litigants have the equivalent opportunity to get an independent review as they would have if they were able to appeal to an administrative court.

In our view, the commission's argument that Sweden is in violation of the Aarhus Convention fails. Article 9.3 of the Aarhus Convention requires that the public "have access to administrative or judicial proceedings to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment".

Thus, Article 9.3 expressly mentions *administrative appeal* as a sufficient remedy. Although there is an effectiveness criterion in Article 9.4 which is relevant, the ability to appeal to SEPA probably meets those requirements. It may seem odd that an authority both issues guidelines to subordinate authorities on how to apply the law, and reviews the decisions made by those authorities according to those guidelines. However, this is quite common within Swedish environmental law and hardly anything that makes the system incompatible with the Aarhus Convention. The public concerned do have access to justice rights to make an administrative appeal; ENGOs have standing to seek review by SEPA in accordance with the case law of the Supreme Administrative Court and CJEU. The appeals procedure is reformatory, meaning that SEPA rules on the merits of the case and is free to make any new decision it finds suitable according to the law. The procedure is also effective in that the appeals body can injunct any hunting decision if it finds reason to do so. And even if one can question the formal independence of SEPA as an authority under the Government – the constitutional guarantees for this are confined to decisions concerning the exercise of authority against individuals and the application of law, not regulations¹⁹ – it is firmly rooted in Swedish administrative traditions that the Government should not intervene in the authorities' decision-making in individual cases.

Further, there is nothing in the decisions of the Aarhus Convention's Compliance Committee that indicates that the Swedish system of administrative appeal is not in line with Article 9.3. The Committee has not so far expressly dealt with this issue, but its reasoning in other access to justice cases does not lead to a contrary conclusion. Most of the cases concern standing rights,

¹⁹ Chapter 12, section 2 of the Swedish Constitution, *regeringsformen* (2011:109).

and here the Committee has stated that the Convention does not require “*actio popularis*”, but it must not be impossible for the public concerned to challenge administrative decisions and omissions.²⁰ Also, the scope of the review on appeal shall include both the formal and the substantive legality of all kinds of decisions according to both national and EU law.²¹ With regards to Article 9.4, the Committee has stated that the requirement about independence and impartiality also is relevant in administrative appeals. In addition, it is vital that the appeals body can actually stop the challenged decisions from taking effect. This criterion is one of the reasons for why a Parliamentary Ombudsman often fails to meet the requirements of Articles 9.3 and 9.4, as his or her power commonly is restricted to disciplinary actions in the aftermath of decision-making procedures.²² Furthermore, the Compliance Committee has emphasized that the appeals procedures should not be too lengthy and that there should be an equality of arms between the parties.²³ In some situations, the latter cannot be said about the appeals procedure for hunting decisions, as persons who carry a “civil right or obligation” according to ECHR always can go to court according to general administrative law principles in Sweden. However, this kind of “inequality of arms” can only occur in specific situations when the authorities decide on pro-

tective hunting, and never concerning licensed hunting.²⁴

So, if we only were to discuss national procedural law on the environment and the Aarhus Convention, we could probably put an end to the analysis here, concluding once again that “trees do not have standing”, at least not in Sweden.²⁵ We argue, however, that Sweden’s closed system of decision-making, which does not allow for review of its implementation of EU law by the EU courts, violates the principle of effectiveness. The ineffectiveness of this system is apparent: the Parliament decides that the wolf population in Scandinavia has reached FCS and sets a limit for the total population size at 170–270 animals. Based on this decision, the Government orders SEPA to draw up a national wolf management plan, a task which SEPA is obliged to fulfil. The power to decide on licensed hunting is given to the CABs, within the boundaries set by the Parliament and the Government’s decision. Any decision from the CABs which is in line with the national wolf plan is confirmed on appeal by the SEPA. This could be described as a system without any legal flaws, if it were not for the fact that the original decision by the Parliament is highly questionable from the perspective of EU law. Thus, the system is impotent in that sense that it does not allow any redress for breaches of the Habitats Directive. Therefore, we must continue our analysis. The result is of importance not only to the future of wolves in Sweden, but, importantly, to understanding the relationship between the EU and its Member States.

²⁰ See for example *C/2005/11 (Belgium)*, paras 35–37, *C/2006/18 (Denmark)*, paras 29–31, *C/2011/63 (Austria)*, para 51, also *The Aarhus Convention – An Implementation Guide*. UN/UNECE, 2nd ed. 2013, p. 206.

²¹ *C/2010/48 (Austria)*, para 66, *C/2008/33 (United Kingdom)*, para 124, *C/2011/63 (Austria)*, paras 52–53, also *Implementation Guide*, p. 207. It is worth noting that in this context, “national law” means both Member State law and EU law on the environment, see *C/2008/18 (Denmark)*, para 59, reiterated in the Report 2008-05-22 to the 3rd Meeting of the Parties (ECE/MP.PP/2008/5. para 65).

²² See e.g. *C/2011/63 (Austria)*, paras 58–61, also *Implementation Guide* p. 209f.

²³ See *Implementation Guide*, p. 209ff.

²⁴ If a Sami village applies for protective hunt on a brown bear which prey on their reindeers, this surely concerns the village’s civil ECHR rights, therefore the authority’s rejection of the application can be challenged in administrative court (Section 3 of the Administrative Procedure Act, 1986:223).

²⁵ See Darpö, J: *Biological Diversity and the Public Interest*. From de Lege 2009 (Yearbook of the Faculty of Law, Uppsala Universitet), p. 201.

Access to Justice under EU law

Strict protection according to Article 12 of the Habitats Directive clearly has direct effect under EU law. This means that the requirements in that provision have precedence to Member States' laws and that national authorities and courts are obliged to set aside – “disapply” – conflicting rules. This state of affairs is self-evident for most lawyers concerning free movement of goods and services, labour law, social security, and other areas where there are distinct bearers of the rights that are expressed in EU law. However, acknowledgement of direct effect in matters pertaining to environmental law, which often concerns “diffuse” interests, has occurred somewhat more slowly, at least on the Member State level. This is despite the fact that the CJEU has clarified in its jurisprudence that environmental provisions of EU law can also have direct effect.²⁶ Many of these cases were brought not by individuals, but ENGOs.²⁷ The final confirmation that these organisation are rights bearers with respect to EU environmental law came in C-115/09 *Trianel*, in which CJEU states in paragraph 48 (our italics):

It follows more generally that the last sentence of the third paragraph of Article 10a of Directive 85/337 must be read as meaning that the ‘rights capable of being impaired’ which the environmental protection organisations are supposed to enjoy *must necessarily include the rules of national law implementing EU environment law and the rules of EU environment law having direct effect.*

ENGOs may thus represent the environmental interest, not only if EU law provisions have

been implemented in national legislation, but also when they have direct effect. Whether this also leads to the conclusion that ENGOs should have standing in national courts is – in our view – a somewhat different issue, which relates more closely to the principle of legal protection under EU law, or the “useful effect” (*effet utile*) of the provisions in question.

The development of case law concerning access to justice in environmental matters in the Union has been rapid since accession to the Aarhus Convention. In a series of judgements, CJEU has clarified that ENGOs should have the ability to challenge the authorities' actions and omissions concerning the environment.²⁸ However, most of these cases concern Article 9.2 of the Aarhus Convention. When it comes to Article 9.3, there is a limit to the impact of the Convention in EU law, expressed in the C-240/09 *Slovak Brown Bear* case. Here, CJEU made clear that it is a Union law obligation for the national courts to interpret “to the fullest extent possible” the national standing rules in order to enable ENGOs to challenge administrative decisions that may be in breach of EU environmental law. It should thus be noted that the national courts are not required to set aside procedural rules barring ENGO standing. In other words, Article 9.3 of the Aarhus Convention does not have direct effect. The extensive impact that the *Slovak Brown Bear* has had in the Member States can instead be explained from the fact that most legal systems use “open provisions” or mere jurisprudence when defining the public concerned and its standing rights. In many situations, it is therefore possible for the national courts to use the “so as to enable” formula in order to grant standing. In fact, this was what happened in the Swedish courts after 2012

²⁶ See Darpö, J: *Article 9.2 of the Aarhus Convention and EU law. Some remarks on CJEU's case law on access to justice in environmental decision-making*. JEEPL 2014 p. 367.

²⁷ For example C-44/95 *Lappel Bank (RSPB v. UK)*, C-435/97 *WWF*, C-165-167/09 *Stichting Natuur en Milieu*.

²⁸ See the case law data base of the Task Force on Access on Justice under the Aarhus Convention, <http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html>.

when the ENGOs challenged the hunting decisions.²⁹ However, this formula has no effect on provisions which are “closed”, such as Section 58 of the Hunting Regulation, which expressly says that there is no appeal from SEPA’s decisions. One cannot interpret those words as meaning that there may be standing to appeal to court, quite the contrary.

We therefore have, on the one hand, strict rules on the protection of species at the Union level which have direct effect in the Member States, and, on the other, a national standing rule that bars ENGOs from challenging administrative decisions applying those provisions. Of course one can argue that in this situation the impact of EU law in the Member State depends upon whether the national procedural law allows for such an action or not. In our view, this does not hold true, especially if one considers CJEU’s past jurisprudence on access to justice in environmental decision-making. One can just imagine what the court would say about a legal order where the legislature in a Member State has actively barred ENGO standing with the aim of preventing the national courts from invalidating decisions that violate EU law. In our view, this amounts to an “inverted detective story”, where you know the answer from the beginning, but the thrilling part is to discover the road leading up to it. We think the solution lies in the principle of effective legal protection under EU law, as expressed in Article 19 TEU.

The principle of effective judicial protection

To begin with, it should be emphasized that the Union does not generally concern itself with the administrative method by which the Member

²⁹ The Supreme Administrative Court has even expanded this attitude to situations which only involves national environmental law, such as forestry. See the *Änok* case in the data base of the Task Force on Access to Justice, mentioned in footnote 28.

States choose to implement EU law. Brussels would probably react only if it can be showed that the competent authorities do not have the means or competence to fulfil the common obligations.³⁰ Accordingly, that the Swedish government delegates the power to decide on licensed hunting to the CABs is relatively uncontroversial.

Instead, the discussion concerns whether the principle of useful effect in relation to strict protection under the Habitats Directive requires that derogation decisions can be brought to national courts. Here we have a conflict between the procedural autonomy of the Member States and the principle of legal protection of EU law. Surely, one can imagine that provisions with direct effect may not have impact in certain situations, but the limits are set by, first, the principle of equivalence and, second, the principle of effectiveness.³¹ The meaning of the last principle was elaborated upon by Advocate General Sharpston in her opinion in *C-263/08 DLV* (our italics):³²

Finally, I add that, in my view, the result would have been the same had there not been a specific provision such as Article 9 of the Aarhus Convention or Article 10a of Directive 85/337, as amended. The case-law of the Court contains numerous statements to the effect that Member States cannot lay down procedural rules which render impossible the exercise of the rights conferred by Community law. Directive 85/337, which introduces a system of environmental assess-

³⁰ This can be illustrated by *C-301/12 Cascina di Prini* (2014), see para 43.

³¹ See e.g. *C-201/02 Delena Wells* (2004), para 67 or *C-240/09 Slovak Brown Bear* (2011), para 48.

³² *C-263/08 DLV* (Celex 62002CC0201), para 80. Sharpston referred to the cases *C-430/93* and *C-431/93 Van Schijndel and van Veen*, para 17, *C-129/00 Commission v. Italy*, para 25, *C-432/05 Unibet*, para 43 and *C-222/05–C-225/05 van der Weerd*, among others. Statements like these can also be found in other cases concerning EU law on the environment, e.g. *C-416/10 Križan* (2013), para 85.

ment and confers rights, *would be stripped of its effectiveness if the domestic procedural system failed to ensure access to the courts.* The present case is clear proof that, given that access to justice is made impossible for virtually all environmental organisations, such a measure would fall foul of the Community law principle of effectiveness.

Thus, according to Sharpston, the public concerned has a right to go to court, irrespective of whether or not there is such a possibility expressed in EU secondary law. Today, this principle can be inferred from the second subparagraph of Article 19(1) TEU, stating that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. This provision was introduced with the Lisbon treaty in order to underline the importance of domestic judicial remedies.³³ In this context, it should be noted that Article 19 TEU does not – in contrast to Article 47 of the European Charter – mention “rights”, just effective remedies. So even without far-reaching redefinitions of what constitutes such rights, we can safely presume that the principle of effective judicial protection is based on EU primary law. When EU environmental laws are implicated, CJEU’s statement about ENGOs as rights bearers can be added, as this, in our view, is generally applicable. This means that the Member States must provide ENGOs with the ability to challenge administrative decisions and omissions concerning

³³ See Brakeland, JF: *Access to justice in environmental matters – development at EU level.* The article is published in *Gyoseiho-kenkyu*, 2014, No 5, an anthology of contributions at the conference *Towards an effective guarantee of green access*, held at Osaka University in Japan in March 2013. All contributions in the anthology are in Japanese, although Brakeland’s article is also available in English on the link <http://greenaccess.law.osaka-u.ac.jp/wp-content/uploads/2014/05/arten-brakelandup.pdf> See also Jans, JH & Vedder, HHB: *European Environmental Law.* Europa Law Publishing, 4th ed. 2012, p. 183.

provisions of EU law, be they nationally implemented or having direct effect. This conclusion is also in line with the general development of CJEU’s environmental jurisprudence, as well as the general system of EU law. A contrary approach would lead to a situation in which legal provisions with direct effect would be “hanging in the air”, largely dependent upon whether the Member States provide effective remedies. Moreover, the reasons given in other situations against the primacy of EU law, e.g. the principle of legal certainty, are not relevant concerning access to justice possibilities. Despite what sometimes is said in the Swedish wolf debate, the substance of law is evidently not impacted by the fact that an administrative decision can be reviewed by the national courts.³⁴ In sum, we consider it quite unlikely that CJEU will accept Sweden’s attempt to dodge judicial review.

The request for preliminary ruling as a keystone of the judicial system

There is yet another reason for why the CJEU will most probably strike down a legal order in which administrative decisions relating to EU law cannot be challenged in court. The distribution of responsibility between CJEU and the national courts requires that citizens have the ability to go to the latter in order to challenge decisions and omissions under EU law. Only in very particular circumstances will the citizens be able to go directly to CJEU according to Article 263(4) TFEU. This system presupposes that the national courts can request a preliminary ruling from the CJEU, being the main road for those who are concerned by EU law to test its validity and to challenge decisions taken under it. This is not the place for discussing access to justice in environmental matters by way of direct action in CJEU, but the

³⁴ For an interesting discussion along these lines, see C-72/12 *Altrip* (2013), paras 21–31.

stinginess from the court in that respect – recently illustrated by the joined cases C-401/12 P to C-403/12 P *Vereinigung Milieudéfense et al* (2015) – can at least partly be explained from the Court’s emphasis on national remedies.³⁵ CJEU has consistently held that one must regard the EU legal order as a complete system of remedies and procedures designed to ensure judicial review of the legality of Union acts, taking into account both direct action in accordance with Articles 263 and 277 on the one hand, and indirect action according to Article 267 on the other.³⁶ The Article 267 proceedings have also been described as a “keystone” in the judicial system by setting up a dialogue between CJEU and the courts of the Member States with the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency and full effect.³⁷

In the Swedish wolf debate, the judgements in the Dutch cases mentioned above were presented as something very new and clearly showing that EU law does not require access to courts. Our conclusion is quite the contrary; these judgements only repeat what was said in the *Slovak Brown Bear* – that Article 9.3 of the Aarhus Convention does not have direct effect – as well as illustrate the Janus face of CJEU, stressing that the Member States must provide the public concerned with access to the national courts.

However, in order to make the legal system of the EU work, those national bodies which constitute the final instance of review must be accepted as courts or tribunals according to Ar-

ticle 267 TFEU. Without going very deep into this question, we can safely assume that SEPA will not be regarded as such a body. The Swedish tradition of very independent authorities is quite uncommon in most other Member States and from a Union perspective, national agencies are regarded as parts of the government. Furthermore, in our view, when SEPA decides cases on appeal, it clearly does not meet the criteria of being a permanent body with members who are protected against external intervention or pressure liable to jeopardise their independence, or as CJEU phrases it:³⁸

Those guarantees of independence and impartiality require rules, particularly as regards the composition of the body and the appointment, length of service and the grounds for abstention, rejection and dismissal of its members, in order to dismiss any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and its neutrality with respect to the interests before it (...). In order to consider the condition regarding the independence of the body making the reference as met, the case-law requires, inter alia, that dismissals of members of that body should be determined by express legislative provisions (...).

This case concerned whether the Danish Teleklagenævnet (Telecommunications Complaints Board) met the criteria of being a court or tribunal according to Article 267, which CJEU answered in the negative. As Teleklagenævnet is a specific appeals board which is regulated by law and has permanent members, it goes without saying that SEPA will also fail the test. Accordingly, SEPA

³⁵ See Bogojević, S: *Judicial Protection of individual applicants revisited: Access to Justice through the prism of judicial subsidiarity*. Yearbook of European Law 2015, p. 1.

³⁶ See for example C-362/06 P *Markku Sahlstedt* (2009), para 43, C-583/11 P *Inuit Tapiriit Kanatami* (2013), paras 90–106, C-274/12 P *Telefónica* (2013), paras 52–60.

³⁷ CJEU 2014-12-18; Opinion 2/13 on whether the EU’s accession of the European Convention of Human Rights would be compatible with Treaties (ECLI:EU:C:2014:2454), para 176.

³⁸ C-222/13 *Teleklagenævnet* (2014), para 32, see also C-522/C-506/04 *Wilson* (2009), para 53 and Joined cases C-464/13 and C-465/13 *Europäische Schule München* (2015), para 72.

will not be allowed to ask for a preliminary ruling from the CJEU. Therefore, a basic ingredient in the system of effective legal protection according to Article 19(1) TEU is lacking as the system is closed off from the influence of CJEU.³⁹ In our view, it is very unlikely that CJEU will accept such a legal order, particularly when it governs one of the core obligations of the Union's environmental law, that is, the protection of species. Finally, one can also wonder if even the Swedish government would appreciate a system in which SEPA would be accepted as an Article 267 body, as it would trigger an obligation for the agency to ask for preliminary rulings, being the final instance on appeal.

Conclusions and final words

To conclude, we find that the procedural order for appealing wolf hunting decisions in Section 58 of the Swedish Hunting Regulation meets the requirements of Article 9.3 of the Aarhus Convention. On the other hand, the ban on appeals to a court most likely violates the principle of judicial protection and is therefore illegal under EU law. This finding can be based on Article 19(1) TEU, given the particular relevance concerning environmental decision-making through Article 9.3 of the Aarhus Convention. Surely, the lack of clarity in the matter at least requires the Supreme Administrative Court to seek a preliminary ruling from the CJEU. If that court does not choose to do so, there is, as always, the potential for the lower administrative courts to request a preliminary ruling under Article 267 in future cases concerning protective or licensed hunts. After all, this ability of the lower courts to challenge the

Supreme Courts' standpoints on controversial issues has proved to be quite effective in the implementation of EU law in Sweden (cf C-142/05 *Mickelsson & Roos* and C-617/10 *Åkerberg Fransson*).

And finally, some words should be said about the politics of the wolf issue. In our view, it is difficult to understand the previous government's reasoning in introducing the ban on appeals. In 2013, after the ENGOs were granted standing in the wolf cases, the Commission seemed to suspend pursuing its infringement proceeding against Sweden, trusting the national courts to apply EU law. The Swedish government then changed its administrative procedure in order to make it impossible to seek judicial review in a national court. This attitude does not show any developed "Fingerspitzengefühl" for how the bureaucracy in Brussels works. Instead, the politicians seem to be untroubled by the fact that we now have two ongoing infringement cases concerning the wolf hunt, one on the substance and one on the lack of access to justice. Perhaps they have faith that the new commissioner Karmenu Vella from Malta will be more reluctant to act or that the upcoming evaluation of the Habitats Directive will lead to reformed provisions. They may be mistaken in both aspects. As for the first question, a renewed reasoned opinion about the licensed hunt in substance was issued from Brussels no more than two weeks ago.⁴⁰ The Commission now claims that Sweden has failed to show that the Scandinavian wolf population has FCS. Furthermore, by allowing a licensed hunt in 2010, 2011, 2013, 2014 and 2015, Sweden has established a systemic practice which infringes the Habitats Directive. In particular, the hunts failed to meet the requirements in Article 16(1)

³⁹ There are cases where CJEU has accepted such "closed" systems, but they concern very particular situations which are regulated by international agreements and where the competence of the Union is unclear (see Joined cases C-464/13 and C-465/13 *Europäische Schule München* (2015)).

⁴⁰ Additional reasoned opinion about the wolf hunt, European Commission 2015-06-19, case No 2010/4200, see www.jandarpo.se/Övrigt material, however only available in Swedish.

because no other satisfactory alternatives have been considered and the hunts have not been undertaken under strictly supervised conditions, on a selective basis and to a limited extent. Sweden has also failed to demonstrate that hunting would not threaten the growth of the local wolf population to reach a FCS.

The second assumption, that the EU may choose not to require the strict protection of wolves in the future, is based on a misunderstanding of the legal status of the Habitats Directive. This directive aims at implementing the EU's international obligations under the Bern Convention, which also requires the strict protection of wolves. Norway is also a party to the Bern Convention, but has not agreed to comply with the Habitats Directive. The Bern Convention is substantively quite similar to the Habitats Directive, but the situation for wolves in Sweden and Norway differs greatly. The difference lies in the fact that while we in Sweden have the Commission and the CJEU to oversee our compliance with international obligations, the Bern Conven-

tion lacks an effective compliance mechanism. Thus, no supranational body supervises Norwegian wolf management; this is the main reason for why there are 30 wolves in that country, to be compared with 320 in Sweden (50 live in the bordering area).

Be that as it may, the new Swedish government – the Social Democrats and the Green Party – has reached an agreement on the wolf issue. The availability of access to justice shall be investigated and a scientific evaluation shall – once again – be undertaken to determine the conservation status of the wolf population. It is too early to predict the result, but just some weeks ago, Skandulv – the research centre that has advocated the government's policy on licensed hunting from the beginning – was assigned to be one of the two research groups going through the scientific state-of-affairs of the Scandinavian wolf populations' conservation status, despite the protests from the ENGOs on the matter.⁴¹ So, for now at least, there is nothing new under the sun in Sweden.

⁴¹ The other group is led by the US-American ecology professor Scott Mills at College of Natural Resources at North Carolina State University.