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Anything goes, but…

Comment on the opinion by Advocate General Saugmandsgaard Øe in the Tapiola case (C-674/17)

Table of Content

Abstract 2
1. Background 3
2. The Tapiola case (C-674/17) 5
3. The opinion of Advocate General Henrik Øe 6
4. Comments 8
5. Concluding remarks 11

Abstract

The "wolf issue" is hot all over Europe, not least in the Nordic countries. Due to pressure from farmers' and hunters' organisations, license hunts are performed on a large scale basis in Norway, Sweden and Finland. As the wolf is strictly protected under the Habitats Directive, hunts must have a legal basis in a derogation decision according to Article 16(1). Many of the hunting decisions issued by the authorities under this provision have been challenged in the national courts by the ENGO community, but so far with little success. However, in late 2017, the Finnish organisation *Tapiola* brought a case all the way to the Supreme Administrative Court, which requested a preliminary ruling by the CJEU on whether such a license hunt is in line with the Directive. The Advocate General's opinion in this case (C-674/17) came in May. This article is a comment to that opinion.

Key words: Habitats Directive, Species protection, Derogation, Wolf issue, License hunting, Favourable conservation status…

1. Background

The "wolf issue" is hot in all of the Nordic countries, as well as in other parts of Europe. The conflict is basically between species protection under the Habitats Directive (92/43) of the European Union and the interests of farmers and hunters, but it touches upon many contentious issues at a more general level; national decision-making and EU law, centre and periphery, "city intellectuals" and "countryside workers", etc. Especially in regions to where the wolf has returned in recent years, conflicts are sharp as farmers and hunters and their organisations advocates large scale hunts in order to protect their business, game and "traditional way of living". In Norway, Sweden and Finland, the governments have listened to this opinion and allowed for "license hunts" in order to keep down the wolf population.

The Scandinavian wolf population is shared between Sweden and Norway.[1] The latter country is not bound by the Habitats Directive[2] as this piece of legislation was left out of its economic agreement with the Union (EEA), but the country is a Party to the Bern Convention.[3] Comprehensive license hunts have been undertaken since 2015, where the authorities have issued licenses for up to 50% of the wolf population. These decisions have been challenged by the ENGO community to the courts, but so far with little success.[4] Also in Sweden, management hunts have been performed since 2010. A number of these hunting decisions have been challenged by ENGOs and many were quashed by the lower levels of the administrative courts. However, in 2016, the Swedish Supreme Administrative Court confirmed that the 2016 and 2017 hunts were not in breach of the Habitats Directive (HFD 2016 ref. 89). Due to hunting and other – more or less natural – causes of mortality in the Swedish wolf population, the decline has been quite drastic; from 415 animals in 2014/15 to 300 in 2018/19, which amounts to a decrease with more than 25%. It is widely understood that poaching is widespread in both Norway and Sweden and estimates from ecologists show that as much as 50% of the yearly mortality in the population can be attributed to it. Finally, it should be mentioned that the Commission has an infringement proceeding ongoing against Sweden since late 2010 on the wolf policy.[5]

In Finland, the wolf issue has been controversial for decades, at least since the country became a Member State of EU (1995). The wolf population in that country is shared with Russia (the Finnish-Karelian population). In Finland, the species is listed in Annex V in the reindeer herding areas and Annex IV south of that region. It is commonly understood

[1] Even Denmark has about 80-100 wolves today, belonging to a continental population coming from Germany. The "wolf issue" is getting contentious also here, but – in my knowledge – license hunts have not been on the political agenda so far.

[2] Council Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora.

[3] Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

[4] Here it can be noted that in Norway – in contrast with both Sweden and Finland – these cases are brought to the ordinary courts in civil proceedings, something which entails substantial costs for the losing party. In 2018, when WWF lost the case when challenging the license hunt, they were ordered to pay equivalent to €44,500 in litigations costs in the first instance (Oslo district court).

[5] European Commission, infringement case No 2010/4200: Letter of formal notice 2011-01-28, Reasoned Opinion 2011-06-17 and a complimentary Reasoned Opinion 2015-06-18. The Swedish Government's and the Commission's communications are posted on the website; www.jandarpo.se /Övrigt material, however only in Swedish.

that the wolf population in the country does not have favourable conservation status and that the level must rise to at least 25 pairs (which usually counts for 250 individuals) to be viable. Hunts for management purposes have been performed since 2005, but the derogation grounds have varied. Early on, the Finnish Ministry of Agriculture and Forestry set a national quota which was divided between the reindeer herding area and the rest of the country. The figures thus distributed set the maximum number of wolves that the regions could allow to be killed in situations where the derogation grounds under the Habitats Directive were met. If those numbers were exceeded, derogations must be decided by the national Finnish Wildlife Agency instead. Under this management, the wolf population developed to 270-300 specimens in 2007, but decreased thereafter to 120-135 in 2013. According to the Wildlife Agency, the decline was largely caused by a low tolerance among the inhabitants in the areas that hosted wolves, something which resulted in a widespread poaching. In the light of this development, the Finnish government in 2015 launched a new strategy. During a two-year trial period, wolf hunts were allowed on a wider scale in areas where the species was present in large numbers and where they caused particular damage or nuisance. For each year, a quota was set and licenses issued in conflict areas, setting conditions to ensure the viability of the wolf pack which was to be targeted. The derogation ground for the hunt was said to be Article 16(1)(e) of the Habitats Directive. For the hunting season 2014/15 the ceiling was set to 29 wolves, 24 licenses were issued and 17 animals shot. In 2015/16, the similar figures were 46, 46 and 44. At that time, the Finnish wolf population was estimated to 275-310 specimens. After the two years, the experiment was concluded. The reason for this was the failure in targeting the animals which were supposed to be killed, which affected the population in an unexpected way. Thereafter, only derogations according to Article 16(1)(b) and (c) have been used, that is protective hunts and hunts in the interests of public health and public safety. Today, the number of wolves is around 200.

Finland has already been involved in a case before the CJEU concerning its wolf policy. In 2005, the Commission sued the country for breach of the Habitats Directive by authorising hunting licenses on a preventive basis. Even though the *Finnish wolf case* (C-342/05 (2007)) mainly concerned "protective hunts" under Article 16(1)(b) of the Habitats Directive, the CJEU made important general clarifications about the application of the derogation regime. First of all, the Court stated that the derogation grounds shall be interpreted strictly. Second, it is for the deciding authority to show that all requirements for derogation are at place and this must be clearly stated in the decision. And third, derogations can be granted even though the conservation status for the species is not yet favourable, as long as the status is not impaired.[6] Then concerning the derogation ground (b), the CJEU found that even though the authorities are not required to wait until serious damage has been sustained, such decisions must not be issued on a preventive basis. Instead, the wolf – or several wolves in a pack – which is likely to cause damage must be identified and targeted. Against this background, Finland was found in breach of Article 16(1)(b) by authorising hunting licenses on a preventive basis.

This judgement is the only one from the CJEU about takings under Article 16(1) of the Habitats Directive. However, there are many more cases under the Birds Directive (2009/147) which can be used in analogy. This body of case-law together with statements of the Standing Committee under Bern, as well as "soft law instruments" such as guid-

[6] C-342/05 (2007), para 25 and 29.

ance documents issued by or at least endorsed by the Commission forms a substantial body of "interpretive factors" for the understanding of Article 16(1) of the Habitats Directive. The wolf issue has also been widely discussed in the literature; by legal scholars, conservationists, ecologists, political scientists and others.[7]

2. The Tapiola case (C-674/17)

Under the wolf management plan 2015/16, two licenses were issued to individual hunters for 3 and 4 animals respectively in identified packs consisting of 5-7 wolves. The stated purpose for the derogations was to make the inhabitants in those areas more tolerant of the presence of the wolves with the aim of bringing down poaching, which in turn would improve the conservation status of the species. The packs in question were said to have repeatedly injured hunting dogs. Legal action was taken against the decisions by the ENGO *Tapiola*, asking for annulment in the administrative courts. The ENGO claimed that the decisions infringed Articles 12 and 16 of the Habitats Directive as derogations from the strict protection can only be authorized when a species has reached favourable conservation status. In contrast, this hunt would have adverse effect on a species which is seriously endangered in Finland. Moreover, the license hunts would not achieve the objectives expressed in the management plan. *Tapiola* also questioned that the expression "taking" in Article 16(1) includes killing.

The case went all the way to the Finnish Supreme Administrative Court (SAC). As that court found that it was unclear whether such a hunt was in line with the EU legislation, it posed the following three questions to the CJEU for preliminary ruling:[8]

> 1) Can regionally restricted derogation permits based on applications from individual hunters be granted for hunting for "population management purposes" under Article 16(1)(e) of the Habitats Directive, … having regard to the wording of that provision?

Under this question, the SAC also asked whether it is relevant that the hunt is performed under a national population management plan, which regulates the maximum number of animals allowed to be killed annually. The court also wondered if factors such as the protection of hunting dogs and the general feeling of security among the habitants can be taken into account.

> 2) Can derogation permits be granted for hunting for population management purposes, as described in the first question, on the basis that there is no satisfactory alternative within the meaning of Article 16(1) of the Habitats Directive to prevent poaching?
>
> 3) How is the requirement laid down in Article 16(1) of the Habitats Directive concerning the conservation status of species' populations to be assessed when regionally restricted derogation permits are granted?

[7] Many of these legal and other sources are cited in the AGs opinion. As this is only a case commentary, my references are limited to when it is necessary to support a controversial statement.

[8] I have omitted to include all the sub-questions in the request for preliminary ruling, as the most important are covered by my account for the AGs answers below.

The third question was further clarified in that it related to both which area (geographic scope) shall be taken into account when assessing the conservation status of the species, and whether taking is allowed even when that conservation status of the species cannot be regarded as favourable.

3. The opinion of Advocate General Henrik Øe

The Advocate General begins the opinion with some general remarks (paras 35-45). First he notes that the hunt was concluded with the killing of 43 or 44 animals. The trial with management hunts according to Article 16(1)(e) was thereafter discontinued, showing no conclusive evidence that it had contributed to any decrease of poaching. Thereafter the Advocate General highlights that Article 16(1) contains two general requirements for derogations from the strict protection; first the absence of any satisfactory alternative solutions, and second that the derogation is not detrimental to the maintenance of the conservation status of the species. Further, that provision can only be used in situations which are covered by the derogation grounds (a) to (e), the latter allowing the killing of species listed in Annex IV of the Habitats Directive under specific requirements. The Advocate General then refers to CJEU's findings in the *Finnish Wolf case*, namely the above-mentioned findings about strict interpretation, the burden of proof on the deciding authority and clear and sufficient reasons for the derogation. He also points to the fact that case-law under the similar provision in Article 9 of the Birds Directive (2009/147) is relevant for the understanding of Article 16 of the Habitats Directive.

Next, the Advocate General discusses the alternative requirement, which in his view is an expression of the general principle of proportionality under EU law (paras 46-53). In this case, the objectives to be pursued were to reduce poaching, prevent harm to dogs and to improve the general feeling of security of the inhabitants in areas with large populations of wolves. As these measures were said to increase the social acceptance with the wolves, they would contribute to the conservation of the species, as well as taking into account human interests. According to the Advocate General, it follows from the wording, scheme and general purpose of Article 16(1)(e) that these aims for management hunting are legitimate.

What comes next in the opinion is in my view the key passage. The Advocate General first notes that in contrast with other derogation grounds in Article 16(1), the e)-point does not list the objectives to be pursued by derogation. Instead, the Member States discretion is limited by the stricter requirements set out here and it can therefore be used whenever the other derogations grounds are not fully met (my italics):

> 51. Under those circumstances, the objectives that can justify granting a derogation permit under Article 16(1)(e) of the Habitats Directive can include both improving the conservation status of the species and protecting opposing interests. Those interests include, but are not limited to, those referred to in Article 16(1)(a) to (d). *Given the particularly strict requirements* set out in Article 16(1)(e), granting a derogation permit on that basis in order to pursue objectives that overlap with those listed in Article 16(1)(a) to (d) does not, contrary to the assertions of Tapiola and the Commission, have the effect of circumventing the grounds for derogation established in that article.

> 52. In practice, as the Finnish and Danish Governments observed, since the detailed specifications under Article 16(1)(e) of the Habitats Directive *are stricter than those accompanying the other grounds for derogation*, use of that provision to pursue objectives already covered by Article 16(1)(a) to (d) of that directive *will be envisaged where it has not been shown that the requirements for those grounds of derogation to apply have been satisfied*.

Further, as the Advocate General explains in a footnote to the paragraph above, derogation ground e) can also be applied when the beneficial effects expected on the conservation status of the species from the use of a) to d) cannot be fully established. This understanding is in line with Article 2 of the Directive, where it is stated that economic, social and cultural requirements and regional and local characteristics shall be taken into account when measures are taken to maintain or restore the protected species at a favourable conservation status.

Even so, the Member States are required to show supporting evidence for that the derogation will meet its objectives (paras 54-69). In this case, the Advocate General states that the Finnish Wildlife Agency has shown that problems exist in that poaching is widespread and dogs have been injured, although the supporting evidence for the existence of inhabitants' fear is not apparent. However, he is more hesitant when it comes to the question whether the hunting licenses had been capable in achieving the stated objectives. To begin with, one cannot require full evidence for such an effect as this was only a two years' trial, especially since Article 16(1)(e) in his view allows for measures to be taken in order to improve the conservation status of a species, even where there is a degree of uncertainty as to the result. Instead, it suffices for the authorities to support the hypothesis that management hunts would reduce poaching to the extent that the conservation status of the species will be improved, or at least, not be deteriorated. In this case, however, there is nothing to suggest that the Wildlife Agency had supported this with scientific data, why it is up to the Finnish court to assess if that is the case. The Advocate General for his part, points on a couple of factors which contradict such an assumption; the killing of 43 or 44 wolves – amounting to 15% of the population – are numbers that would at least make the referring court circumspect to that effect, especially since this exceeds the number of animals which were illegally killed during the same period. Also the hypothesis that license hunting may prevent damages to hunting dogs needs to be verified before the referring court by concrete evidence.

Concerning the examination of available alternatives (paras 70-76), the Advocate General notes that the order for reference contains no evidence that the Wildlife Agency has considered any alternative measures to achieve the stated objective. Even though the Agency today claims that hunting is only one out of many measures to be taken in order to improve the social acceptance of the wolf population, it is for the referring court to decide on this matter as well. If it finds that the authority granted the licenses without providing clear and sufficient statement of the reasons why no other solutions could have achieved the objectives, this would be in breach of Article 16(1) of the Habitats Directive.

The Finnish SAC also asked about the geographic scope when deciding on "the population in their natural range" (paras 77-88). Here, the Advocate General points to the fact that there are no definitions in law of these concepts, why guidance may be found in Articles 1 and 2 of the Directive. Thereafter, he dismisses the positions that the assessment

of the population status either can be limited to the local area, or in contrast, to a territory that crosses the boarders to a third country outside the EU. Instead, the assessment of the status must be performed at the level of a Member State as a whole, or of the biogeographical region within that State in which the derogation is decided. Such a geographic scope is also necessary in order for the authorities to be able to assess the cumulative effects on the population status of various derogations and other causes of mortality in the Member State.

Thereafter, the Advocate General comments upon the question whether derogations can be applied according to Article 16(1) even when the conservation status of a species is not favourable (paras 89-92). Referring to the *Finnish wolf case*, he points to that the CJEU made clear that this is possible as long as the measure does not worsen the species unfavourable conservation status. All in all, the effect of the measure must be neutral, which according to the CJEU occurs only in exceptional circumstances. To this, the Advocate General adds that the precautionary principle applied to this situation means that the competent authority must refrain from granting derogation if significant doubts remain whether it will be detrimental to the maintenance or restoration of the species favourable conservation status.

The last questions in the reference for a preliminary ruling deal with the role of the Finnish wolf management plan and the specific criteria on limited numbers, selectivity and strict supervision in Article 16(1)(e) (paras 93-98 and 99-112). Here, the Advocate General first considers that such a plan may ensure that the total bag of animals taken by way of different derogations under Article 16(1) is set at a level which is not detrimental to the species conservation status. As for the limited number criterion, the Advocate General first states that this requirement comes in addition to the general condition about the neutral effect to the conservation status expressed in the first sentence of Article 16(1). This means that derogation under the e)-ground cannot be granted if there is a risk that it may have a significant negative effect on the population concerned in quantitative or qualitative terms, even though the effect to the conservation status would be neutral. He also states that case-law under the "small numbers" criterion of Article 9 of the Birds Directive can shed light over this issue, referring to case-law where it has been made clear that this assessment depends on the population level of the species, its conservation status and its biological characteristics. Also the species' reproduction and total annual mortality rate owing to natural causes should be taken into account. Finally, according to the Advocate General the number criterion also depends upon the size of the population of the species. About the selective criterion, the Advocate General states that a hunt under Article 16(1)(e) may require a more precise targeting of specimens or categories of specimens to be taken. Last but not least, strictly supervised conditions basically means an effective control of the hunt. Having said this, when applying those criteria on the Finnish hunt of 43 or 44 wolves during 2015/16, the Advocate General doubts that that derogation was in line with Articles 12 and 16 of the Habitats Directive taking into account the large number, as well as the fact that there was no ban to the killing of breeding specimens. He also notes that the wolf population fell drastically after the hunt.

4. Comments

First of all, I want to clarify a starting point for my discussion about the Advocate General's opinion. The ENGO *Tapiola* seems to put quite some effort in convincing the

CJEU that the expression "taking" in Article 16(1)(e) does not include intentional killings such as hunting. In my view, that is a tactical mistake, as the law seems to be clear on that point. Even though the Advocate General just comments on this issue in a footnote, he does it well and convincingly.[9] He points to the fact that Annex IV to the Habitats Directive includes both animal and plant species and the expression "killing" would not cover the latter ones. He also refers to the Commissions Guidance document from 2007 and case-law under the Birds Directive, especially C-182/02 and C-344/03. To this one may add that the Standing Committee under Bern has stated that killing is covered by the similar provision in Article 9 of that Convention.[10] Also taking into account that all other parties to the proceedings seem to share this view, I will not discuss it further.

Having said this, my comment is circumscribed to those points in the Advocate General's opinion which I find especially problematic.[11] My main objections are systematic as his understanding of derogation ground e) actually strips away with all other grounds under Article 16(1), although he claims the opposite. According to the opinion, the e)-ground can be used whenever other derogation grounds cannot be applied. The first question arises then; why do derogation grounds a) to d) even exist? His response to this is that derogation ground e) puts additional and stricter requirements for its use compared with the others. I cannot share that view as these requirements are normal hunting conditions. What is additional in requiring a limitation of the number of animals to be taken on a selective basis under strictly supervised conditions? Has anyone heard of a protective hunt under Article 16(1)(b) which is *not* targeting a certain number of animals and performed under such conditions? It may be noted that these requirements for protective hunts were made clear by the CJEU already in the *Finnish wolf case* in 2007. The same goes for the other derogation grounds under Article 16(1). Takings in the interest of protecting other wild fauna and flora (a), in the interest of public health and safety and for other reasons of overriding public interest (c), as well as for the purpose of research and education, repopulating and re-introducing of these species (d) are all commonly performed under such strict conditions. There are exceptions, for example when certain species must be killed in order to avoid the spreading of serious diseases, but these situations are not typical. As the strict requirements thus apply generally, the Advocate General transforms Article 16(1)(e) from a last resort provision which application is "in practise exceptional"[12] to an always existing possibility to derogate from the strict protection under Article 12, even when the explicit requirements in derogation ground a) to d) are not met. There is little support for such a conclusion in any of the sources of law he uses in his opinion. One may of course argue that this line of reasoning is embraced within some circles of conservationists, but this position is not in line with a straight-forward reading

[9] Footnote 5 to paragraph 40. It may be noted that his line of argument is the same as the ones used by the Swedish Supreme Administrative Court in HFD 2018 ref. 89.
[10] Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of Bern Convention, Strasbourg, 2 December 2011 (T-PVS (2011) 2), see p. 4f.
[11] I realize that his reasoning around the geographic issues concerning the concepts "population" and "natural range" are vital from a conservationist point of view, but leave it to others and more knowledgeable scholars to comment upon.
[12] Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive, European Commission (Brussels), final version, February 2007, p. 56 para 26.

of the text, or in my view, the scheme and general purpose of Article 16(1) for that matter.[13]

Another systematic issue lies in the difference between species listed in Annex IV and those in Annex V of the Habitats Directive. A common understanding of the differences between the annexes is that species listed under the latter can be subject to quota hunting – see Article 14(2) – whereas those in Annex IV are strictly protected. Another common ground is that the listing should mirror the conservation status of the species and therefore be scientifically scrutinized on a regular basis with the aim of updating, moving species from one list to another. From different reasons, this has never happened. The result is that Annex IV still contains animal species which has rocketed in numbers and since long have obtained favourable conservation status, such as the brown bear in Sweden. Today numbering to nearly 3,000 specimens out of 15-16,000 in all of the EU, the species still is listed in Annex IV and thus covered by the strict protection regime in Article 16(1). In my view, it is quite apparent that the application of these provisions must take into account the scientific factors concerning the conservation status. In this respect, I share the Commission's attitude that there is no reason why license hunts cannot be performed on species which undoubtedly have favourable conservation status, irrespective of its listing. However, this issue is not raised at all in the Advocate General's opinion. He mentions that the population level of the species is of importance, but does not give any arguments as to why license hunts can be performed on species which have not reached favourable conservation status.

Finally, what became of the limited number criterion in Article 16(1)(e)? According to the provision, the derogation can only apply "to a limited extent"…the taking of "certain specimens"…"in limited numbers". The Advocate General confirms that the e)-ground provides for something more than just the limitation which lies in the first sentence of Article 16(1), namely that the derogation must not adversely affect the conservation status of the species. In this respect, he claims that when the competent authority applies the e)-ground, it must also establish that there is no risk that it will have a significant adverse impact on the conservation status. But what does this actually mean, especially when we deal with a species which have unfavourable conservation status? Even though the Advocate General does not embrace the idea of taking 15% of the population under the limited numbers criterion, his answer is not elaborated. In this respect, we may have expected more clarification as to the difference between these two requirements than what can be read out from his reasoning and conclusion No 4:

> Any such risk must be ruled out by limiting the number of specimens to which the derogation relates and requiring that it be implemented selectively, on the basis of detailed specifications that will depend on the level of that population, its conservation status and its biological characteristics. Those conditions must be precisely defined in the derogation decision. Satisfaction of those conditions must be strictly supervised.

[13] The perhaps most apparent example of this conservationist understanding of the law was when the network LCIE intervened on behalf of Sweden in the beginning of the infringement case about the license hunt in 2010. The organization made a statement claiming that "as conducted [the hunt] could have been justified under several derogation criteria" in Article 16 of the Habitats Directive, see Position statement from the LCIE on the 2010 Swedish wolf hunt, December 2010, citation from page 3.

To me, this is just to repeat what is already stated in Article 16(1)(e). The inherent problem that comes with this understanding is that everything becomes a question about keeping above a certain number for the viability of the species in question. That way, "anything goes" so long as the derogation does not worsen the species unfavourable conservation status, or prevent its restoration at a favourable status. For example, this is how the Swedish SAC understands the relation between the first sentence of Article 16(1) and derogation ground e). This court seems also to regard the Swedish reference value (300 wolves) as a maximum level, as it accepted the hunt of 24 specimens for the 2017 hunting season, even though it was confirmed by then that the previous year's hunt of 14 specimens together with other causes of mortality led to a 20% decrease of the population from 415 to 340 animals. As it has developed, the population went down to 305 the year after and has not gone up since then. This goes to show that this understanding of the number criterion together with the "neutrality criterion" in the first sentence of Article 16(1) may lead to a very slow recovery of species with poor conservation population status, if any.

5. Concluding remarks

The opinion by the Advocate General was warmly welcomed by the hunters' association throughout Europe. In a press release on 10 May, the European Federation for Hunting and Conservation (FACE) confirms that this is what they always have asked for, that is a leeway for the Member States to allow hunting of animals such as large carnivore, even when the population has unfavourable conservation status.[14] As the organisation understands the opinion, such a hunt can be accepted as long as the neutrality requirement is met. I do understand their enthusiasm, as the opinion opens up for a new, much looser formulated and always available derogation ground than those in Article 16(1)(a) to (d). Although both poaching[15] and general fear for wolves seem to be out of the question since license hunt has not been shown to have effect in combating those problems, it is not complicated to draw up a scenario which can be accepted by the courts. One such example may be license hunt as a means to save the prey for the hunters, which actually goes to the heart of the wolf issue. That would certainly increase the social tolerance among large groups of rural inhabitants, and it is probably not very complicated to show that the reduction of whole wolf packs will have such an effect, at least in the short run. Such a "selective" and "limited" hunt obviously be performed under strictly supervised conditions. The same goes for license hunts performed in similar way in order to reduce damage to sheep farmers, at least so long as the authorities do not require electric fencing as a prerequisite for compensation or offer subsidies for the undertaking of such measures.

Also from a wider biodiversity perspective, the Advocate General's opinion is worrying, as Article 16(1) of the Habitats Directive has a much wider application than just license hunting on large carnivore. The need for strict protection of species occurs in almost any situation where human development is on its way; building projects, infrastruc-

[14] https://www.face.eu/2019/05/press-release-large-carnivore-hunting-as-a-management-tool-gets-green-light/

[15] Here it can be mentioned that the Swedish government in its communications in the infringement proceedings with the Commission no longer argues that license hunting is an effective means for bringing down poaching.

ture, industrial installations, energy projects, waterworks, use of chemicals, etc. It is also closely linked to the understanding of Article 12. According to the case-law of the CJEU, the "deliberate requirement" there covers projects where killings-disturbances are not intentional, but known indirect effects. The effect of windfarms in sensitive areas for slow flying birds of prey is one such example. In most Member States, it is considered that Article 16(1) leaves no room for derogation on behalf of such an installation, as the location of the turbines can commonly be adjusted in order to protect the birds. In others, derogations instead are granted under various grounds in Article 16.[16] In the latter, a loosening up of Article 16 would leave open for all kinds of "imaginative" applications of the strict protection scheme to the detriment of protected species.

To this background, it is my sincere hope that the CJEU does not follow suit in the Advocate General's line of reasoning. If Article 16 of the Habitats Directive shall uphold the strict protection scheme for species listed in Annex IV – especially those which do not have favourable conservation status – it is decisive that derogation ground e) is not turned into something that overrides the stricter requirements in all other grounds, but is kept as a "last resort" possibility.

[16] See Backes, C & Akerboom, S: *Renewable energy projects and species protection. A comparison into the application of the EU species protection regulation with respect to renewable energy projects in the Netherlands, United Kingdom, Belgium, Denmark and Germany.* Utrecht Centre for water, oceans and sustainability law. Report commissioned by the ministries of Economic Affairs and Climate and Agriculture, Nature and Food Quality, Amsterdam 2018-05-28.