Sieps
Swedish Institute for European Policy Studies

European Policy Analysis

SEPTEMBER · ISSUE 2011:8epa

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On the encounter between species protection according to Union law and the Swedish wolf policy

Abstract

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 EUs Habitats Directive. Following certain exchanges in 2010, the European Commission sent a formal notice to the government in January 2011. The Swedish government replied to the Commission in late March. The Commission's reasoned opinion came in June and the Government answered two months later. In that response, the government – according to its own words – announced a temporary change of policy in order to circumvent the legal action from Brussels. Next step belongs to the Commission, which in the course of the fall and winter will study the 'newer' wolf policy in order to evaluate compliance with Union law.

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 the environmental NGOs and the European Commission as defenders of Union law. A thorough analysis is undertaken of the Swedish regulation on license hunting in comparison with the legal requirements of the Habitats Directive. The author concludes that the Swedish wolf policy is in breach with the obligations according to Union law to protect the 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 1964 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 stronger, with numbers increasing to nearly 50 in 2004 and to more than 200 by 2010. The current population is estimated at between 250 and 290. Packs have been established in several territories, most of them in central Sweden. The number of rejuvenations is estimated to be more than 20, and the wolf population has been spreading towards

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the eastern and southern parts of the country.[1] However, the genetic base for the population is extremely small and inbreeding coefficients are very high. The present population results from a natural recolonisation of no more than three wolves from the neighbouring Finnish/Russian population in Karelia. It was not until two or three years ago that newcomers 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 northern part of the country. To some extent there is also 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,[2] 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. Hunters and non-hunters alike also express fears for personal safety from direct wolf attack or the transmission of zoonosis. 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.[3] In fact, almost 20 per cent of wolf mortality is estimated to result from illegal hunting and accidents.[4]

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.[5] The proposal was largely accepted by the government and new legislation was enacted in the autumn of 2009.[6] The cornerstone of the new wolf policy was a cap on total population in Sweden to 210 specimens and 20 rejuvenations 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 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 is managed by the Swedish Environmental Protection Agency (SEPA). Each year, the authority will decide on the 'license hunting' of a certain number of wolves in different regions. The first decision came in December 2009.[7] 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 areas. SEPA also ensured that the decision accorded with the Habitats Directive and the case law of the European Court of Justice.[8] 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.[9] Fifteen wolf couples were split, equivalent

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1 Proposition 2008/09:210 En ny rovdjursförvaltning (page 19), Position Statement from the Large Carni vore Initiative for Europe on the 2010 Swedish wolf hunt (December 2010, hereinafter LCI Statement: http://regeringen.se/content/1/c6/15/89/37/595ee0a1.pdf) and oral information from Henrik Andrén (Grimsö Wildlife Research Center, Swedish University of Agricultural Sciences (SLU), Department of Ecology) at a seminar held at the Swedish Species Information Center (ArtDatabanken), Uppsala 2011-04-15.

2 There are two national hunting organisations; Svenska Jägareförbundet (Swedish Association for Hunting and Wildlife Management) and Jägarnas Riksförbund (Hunters' National Association).

3 In connection with the national elections in 2006, four municipalities in Dalarna – one of the regions with the strongest wolf populations – held referendums on wolf policy. Some 60 per cent of voters favoured 'restrictions' on wolf recovery.

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

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

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

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

8 Here, the SEPA referred to the analysis of the *Finnish wolf case* (C-342/05) made in SOU 2007:89, see page 368ff.

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

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.[10]

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 and foremost, it is listed under Annex II to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention).[11] Article 6 states that Contracting Parties shall prohibit all deliberate capture, keeping, killing or disturbances in sensitive periods of protected subjects 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).[12] Its aim, as expressed in Article 2, is to contribute towards ensuring bio-diversity 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 (my italics):

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.[13]

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.[14] Articles 5 and 9 of the Birds Directive contain similar

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10 Opinion by the Swedish Species Information Centre (ArtDatabanken) 2011-02-18 (ref. 33/11 2.3).
11 Bern, Switzerland, 1979-09-19, CETS 104.
12 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.
13 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.
14 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).

provisions regarding species protection to Article 12 and 16 of the Habitats Directive. Case law of the Court of Justice of the European Union is already somewhat extensive on the provisions of the Birds Directive, and thus of great importance for the understanding of similar ones in the Habitats Directive.[15]

In Sweden one of the 16 environmental objectives to be enforced by the environmental authorities is directly related to a rich diversity of plant and animal life. It states: 'biological diversity must be preserved and used sustainably for the benefit of present and future generations'. 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 on '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 Court of Justice (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 Sweden. 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 in reality 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.[16] 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 first stated that the case did not concern deficiencies in Finnish legislation implementing the

[15] Guidance Document 2007, page 7.

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

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, on the one hand, was incumbent on the Commission to prove. On the other, 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.[17]

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'*.[18] 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 the application, the Commission had submitted two decisions by Finnish authorities, permitting protective hunting of a fixed number of wolves in a welldefined 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.[19] However, they were taken before the end of the period 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 against Sweden: 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.[20] 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 on the reindeer herding areas transgressed Article 12. Third, 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.

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17 The judgment at para 25, where the Court referred to case C-60/05 *WWF*, para 34.
18 The judgment para 29 with reference to the Guidance Document 2007, Section III, para 47-51.
19 The judgment at para 30-31 and 47.
20 See http://www.naturskyddsforeningen.se/upload/press/EU-anmalan_varg.pdf - however, only in Swedish.

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.[21] In December, the Commissioner issued a summarising document, arguing that license hunting contravened the Habitats Directive.[22] As the new hunting decision for 2011 was imminent, the Commission requested that the Swedish government freeze that procedure. Nevertheless, a week later the SEPA released its decision on the license hunt for 2011[23], which was explained to the Commission in a letter, a week after that, by the Swedish Ministry of the Environment.[24] 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.[25] 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.[26] The Swedish government replied to the Commission in late March.[27] The Commission's reasoned opinion[28] came in June and the Government answered two months later.[29]

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).[30] The issues that, according to the Commission, raise special concern are:

- the set limits for numbers of wolves in Sweden;
- the license hunt on a strictly protected species without fulfilling the specific conditions relevant to Article 16.1(e) of the Habitats Directive;
- the reduced distribution area for wolves due to their allowed presence in principle only in areas outside the reindeer herding areas in northern Sweden, together forming more than 50 per cent of the country;
- the announced introduction of wolves to improve the genetic status which has actually not taken place and whose success, furthermore, is not guaranteed;

According to the Commission, the derogation ground in Article 16.1(e) 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 this 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, 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. Instead, the hunt should have targeted certain packs or groups of packs in areas where the wolf presence was particularly controversial. The num-

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21 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)).

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

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

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

25 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.

26 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.

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

28 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.

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

30 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.

bers 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 multiannual 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 decisionmaking 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 (Viltvårdsdelegationerna) and strict and closely monitored license hunting. The government also stresses the conflict with hunters and the tradition of using unleashed dogs in forests. Awareness of the social and cultural importance of recreational hunting within the rural communities is essential to identifying solutions that would lead to compliance. It also argues that poaching has decreased after the license hunting in 2010.

Moreover, the government argues that the hunt has not negatively impacted the potential for reaching a favourable conservation status for the species. Rather, it should be regarded as a way of reducing problems of inbreeding as a precursor to introducing foreign wolves. The total number of wolves in Sweden has not decreased as a result of license hunting. Instead, the rejuvenations in 2010 were at a record high of 28 in Scandinavia, 25 of which were in Sweden. This was duly established in the spring of that year. The hunt has proceeded under strict guidelines and was closely monitored. Only 28 wolves were killed, compared with a total of 62 during the year.[31] In 2011, no more than 19 wolves were killed during the license hunt. No genetically valuable specimens 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 set ceiling for the number of wolves to 210 is limited to the three years of 2010-2012. After that, a new decision will be taken by Parliament on the basis of what will be proposed by the ongoing Governmental Commission on Large Carnivores (M 2010:02).[32]

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. The damage from predation is extremely severe for the reindeer keepers. In addition to the value of the killed animals – which is particularly high when a reindeer cow falls victim – losses come from the herd being spread over big areas and accordingly hard to gather, the age structure of the herd which would be disrupted,

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[31] The 62 are registered kills, out of which 44 from hunting (28 in license hunt and 16 in protective hunt) and the rest from illegal activities (poaching).

[32] The Commission delivered a first report on 20 April 2011, SOU 2011:37 Rovdjurens bevarandestatus (The Carnivores' Conservation Status).

and so on. Conflict with the Sami people is therefore considerable. Resistance towards any wolf population existing in these areas is particularly strong and longstanding. One could not overlook these conflicts, as Sweden has international obligations to respect 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. James Anaya, the Special Rapporteur for Indigenous Peoples' Human Rights recently expressed concern for the Sami people in the Nordic region and emphasised that wolves must be kept to levels that did not threaten the reindeer herding economy. 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.

Finally, the Swedish government stated that the introduction of new genes to the wolf population had already begun, by moving a Finnish immigrant from northern Sweden to an area with no wolf population in the country's middle.[33] It highlighted that the Commission on Large Carnivores had 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 licensed hunting for 2012 – the government 'made a poodle'.[34] Without actually abandoning any of its standpoints on the legal issues, it now declared that the set limit of 210 wolves in the country was no longer in force and that there would be no ordinary decision on licensed hunting for 2012. Instead, the possibilities open for protective hunting – organised as a licensed hunt – would now be expanded by new provisions in the Hunting Ordinance, stating that this may be undertaken to the extent 'that is necessary to prevent or reduce risk of harm caused by wolves' (sections 23e and 24e). An assignment to formulate guidelines for this kind of protective hunting was given to SEPA, which also ordered that authority to investigate the options with regard to inconveniences originating from dense wolf populations.[35] The interests to be protected from inconveniences are the cultural or ecological values relating pasture farming and reindeer herding. Other types of economic activity would also be protected from any direct negative effects resulting from dense wolf populations. The new rules on protective hunting will furthermore apply generally to all kinds of large carnivores in the country after 2012. The actual decisions will be made by the County Administrative Boards. In addition, SEPA was allocated the task of issuing a management plan for the wolf population, to be presented in mid-2012.

Controversial issues: introduction

A number of interesting issues connected to wolf policy have arisen upon which I will not elaborate in detail in this article. 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 transborder 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.

A set ceiling for wolves in Sweden is another political question, which will not here be debated further.[36]

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33 Actually, as of today, two wolves have been moved from north to south (SEPA case No. NV-02669-11 and NV-03840-11).

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

35 Miljödepartementet (Ministry of the Environment) 2011-08-16 (M2011/2803/Nm).

36 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 for mal 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).

To make it clear, there is consensus between all parties involved that the wolf population in Sweden/Norway does not have favourable conservation status.[37] 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.[38] The number of wolves needed to gain favourable conservation status is somewhat debatable, but most natural scientists seem to agree that it must be at least 700 animals in Scandinavia.[39] If 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.[40] I also venture to suggest that there are difficulties in introducing new wolves, as illustrated by the fact that one of the wolves recently removed from the north of Sweden to the south wandered back to her old habitat and was immediately shot on entering the reindeer herding area.[41]

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 the new wolf policy was that it would increase acceptance for the population. In fact, there seems 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 is that the number of wolves to be hunted was said to be set too low.[42] On the other hand, according to recent studies, the poaching seems to have decreased quite sharply, which the government uses as an argument for support of its policy.[43] But then again, the decrease started before 2005, which was significantly before the beginning of the new wolf policy. This is a controversial and complicated issue about which, as a legal researcher, I hold no firm position, other than that it seems difficult for the government to actually prove its case. From this standpoint however, I 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 my knowledge, most members of that network are ecologists and other kinds of nature scientists and can hardly be described as experts on social issues. Furthermore, the statement is 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.

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37 This actually goes without saying, as only 20 wolves are allowed to reside in Norway. That 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.

38 LCI Statement page 1. According to Henrik Andrén (see footnote 1), five out of 19 wolves killed in the 2011 hunting exhibited effects of inbreeding depression, mostly retained testes.

39 In its recent report, The Carnivores' Conservation Status, the Commission on Large Carnivores (M2010:02) stated that 450 animals should be regarded as an 'interim' number for the *favourable reference population* for the Swedish part of the Scandinavian population (SOU 2011:37, page 10). The favourable reference population is the population considered the minimum necessary to ensure the long-term viability of the population/species. The estimation is based upon the report of an international evaluation board. The panel argued that in the long term the wolf population in Scandinavia and Karelia should be somewhere between 3,000 and 5,000. This number secures a favourable conservation status for the species, on condition that the under-populations in the different countries are connected by gene flow (Annex 3 to the report, page 125). Other scientists argue that the reference population should be set at between 1,000 and 1,500 animals in Sweden, at least in the long run.

40 My 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/

41 SEPA case NV-03840-11, see http://www.rovdjur.se/objfiles/1/Kompensation_616546057.pdf, page 8f.

42 According to news media, this is the reason why the hunters of Dalarna urged a boycott of the hunt, see http://sverigesradio.se/sida/artikel.aspx?programid=83&artikel=4251831.

43 Liberg, O & Sand, H & Wabakken, P & Chapron, G: Illegal killings of wolves in Scandinavia 1998-2011: variations in time and space. WWF 2011.

Finally in this introduction, I have some brief observations on the issue of a wolf population in the reindeer herding areas. Though this area is large, it is no more than 25 per cent of the country. The controversial region mainly consists of the all-year-round regions, which is a substantially smaller area of the total area where the reindeers reside throughout their lives. The government claims that the same rules for protective hunting apply here, comparable to all other regions of the country. I would regard that as merely a play on words, since any wolf entering the all-year-round areas would be hunted down immediately, either by poaching or protective hunting.[44] As a matter of fact, only three 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. Even though reindeer herders have since 2001 been paid for the hosting of wolf packs, the economic and other burdens from predation seem to exceed by far the advantages. I would suggest that this is a true conflict of interest, and not easily resolved. I certainly have no answer.

The derogation grounds in Article 16.1(e)

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). The SEPA decisions explicitly referred to that derogation ground and it was also made clear in the Commission's formal notice in January. 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, I 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 the 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 at each derogation, with a clear and sufficient statement of reasons in accordance with Article 16.1 for any decisions taken.[45] Second, the above mentioned statement by the Court in para. 29 of the judgment also appears to have general applicability. According to what the Court said there, all of the derogation possibilities in the article can be utilised 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 to that, 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*. In the following paragraphs, I shall discuss those criteria one by one.

The first criterion – *the effect on conservation status* – is purely ecological, a subject about which I can have no advanced opinion. I therefore leave it to readers to compare the arguments of the Commission and the Swedish government. 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 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'.[46]

Something similar can be said about the second issue, whether there are *alternative solutions to the problem*. As already mentioned, the aim of Swedish management hunting is to gain public acceptance for the wolf popu-

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[44] For an illustration on this, see the decision of the County Board of Dalarna (Länsstyrelsen i Dalarna) 2010-12-03 (dnr. 218-6974-10) about protective hunting in the Idre Nya Sameby reindeer herding areas.

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

[46] Guidance Document 2007 page 62.

lation in rural areas, especially among those who suffer from wolf predation. The Commission claims there are alternatives for increasing local acceptance, such as investments in awareness-raising and technical assistance and support for specific stakeholders (for example, livestock breeders), better compensation schemes and preventive measures. Other methods might include making hunting decisions subject to appeal by NGOs and other parties interested in wildlife management, targeting hunting in areas with denser wolf populations or with particular controversies linked to the species, or allowing potentially damage-causing wolves to be eliminated on the basis of the derogation possibility in Article 16.1(b). The government claims that management hunting is the only way to gain public acceptance for the wolf population, as all other measures mentioned have been tried. Obviously, the evaluation of this statement requires consideration of the wider context. I shall therefore address this in my concluding remarks.

Regarding the criteria for derogation under Article 16.1(e) – strictly supervised conditions, on a selective basis and a limited number – I once again wish to remind readers that derogation possibilities should be strictly interpreted. However, before discussing them individually, one should observe that Article 16.1(e) uses the expression '*taking or keeping'*. Does this include hunting? This issue is not raised in the Commission's formal notice, but should at least be mentioned here. The Swedish wording in the directive is '*insamling'*, which is best translated as 'collecting'. 'Collecting' is clearly not the same as 'hunting'. On the other hand, according to the steady case law of the CJEU, all 23 languages of the Union have equal value and the true meaning of a directive provision must be found by comparing the different versions. And if guidance cannot be found in such an analysis, the provision shall be interpreted by reference to the purpose and general scheme of the directive.[47] However, I shall not proceed further with such an interpretive operation, since the matter has been analysed by professor Gabriel Michanek in his article entitled *Strictly Protected Wolf Meets Swedish Hunters with License to Kill*.[48] He finds little guidance to be found in the different language versions, and the purpose of the provision can be argued either way. But as other provisions in the Habitat Directive seem to include hunting – clearly so in Article 14.2 fourth indent, which states that hunting rules shall apply when certain taking is done – he concludes that taking can be seen to mean hunting as well.

The next criterion concerns whether the hunting was being subjected to *strictly supervised conditions*. The Commission plainly did not think so, referring to the fact that at least with regard to the 2010 hunt, conduct was reminiscent of the Wild West. The government, for its part, claimed the hunt was well organised and efficiently operated. On this, it is difficult for me to form an opinion.

The last criterion is the requirement that taking should be conducted *on a selective basis and to a limited extent*. The Commission considered that the hunt was not 'selective' as it applied to all packs, except those expressly exempted. Accordingly, the hunt was not targeted at certain packs or groups of packs in areas where the wolf presence was particularly controversial. In addition, the first generation descendants from immigrated wolves were not all exempt, and those which had left the territories of the immigrant parent were particularly vulnerable. Thus genetic differences were not taken into consideration between inbred wolves and offspring from wolves of eastern origin which needed particular protection from possible future hunting. 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.

Furthermore, on *numbers of hunted animals* the two parties had divergent views. Having said this, there appears to be common understanding on the number of wolves in Sweden and Scandinavia, with 182 to 217 animals in Sweden, and in all of Scandinavia between 250 and 290. But those numbers relate to the period before management hunting in 2010.[49] Additionally, there seems to be no argument about the yearly mortality rate of the species. By any method of calculation, this figure is surprisingly high. According to the government's information, no fewer than 80 were killed during 2010! The Commission claimed that a total bag limit of 28 animals – constituting more than 15 per cent

[47] C-72/95 *Kraaijeweld*, para 28.
[48] To be published in Festschrift for Hans-Christian Bugge in spring 2012.
[49] SOU 2011:37 page 9f.

of the population – could not fall under the criterion of 'to a limited extent'. 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.[50] 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. It also claimed that improvements in genetic status would be facilitated by the fact that the inbred population was being kept quite small.

In my opinion, 15 per cent of a population can hardly be described as 'a limited extent'. Moreover, the fact that the total number of wolves remains unchanged does not in itself mean that the amount of killed animals is limited.[51] 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 counterproductive. 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 – is kept at a high level. In my view, this is wholly controversial. The Swedish rules on protective hunting – seemingly implementing Article 16.1.b) of the Habitats Directive – underwent reform in 2009 as a result of pressure from the farmers' and hunters' associations. The provision on the right of individuals to protect their domestic animals and livestock in section 28 of the Hunting Ordinance was reformulated to allow for anyone to kill a wolf '*when there is reason to believe'* that there will be an attack on domestic animals and livestock, such as a dog in the forest.[52] In my experience, it is unanimously held among public prosecutors in Sweden that the wording of the provision makes it almost impossible to prosecute anybody under it.[53] In addition, the authorities are exploiting the possibility for deciding on 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 dogs on hunting missions.[54] To my knowledge, these decisions were the first of their kind, permitting the killing of wolves on account of their getting rid of rivals for prey in the forest. In this context, it should be noted that hunting with unleashed dogs is rare outside the Nordic countries.[55] The argument, therefore, that there are no alternatives to protective hunting has little substance. Of course, one can hunt small game by other means – by having close control over dogs or simply avoiding hunting with unleashed dogs in such areas. If the taking of endangered species is allowed for such a reason, one can only conclude that no wolf will be safe in Sweden.

In summary, with regard to the criterion on 'limited extent', there are strong arguments against the government's viewpoint. One may also take note to the fact that Section 23c and 23d of the Hunting Ordinance on license hunting do not express this restriction. Still, I 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

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50 C-344/03 para 53-54.

51 C-103/00 *Caretta caretta*.

52 The issue as to whether this provision accords with Article 12 of the Habitats Directive is further analysed by Gabriel Michanek in his above mentioned article.

53 This is at least the impression I gain when I meet the prosecutors in the area on the national course on environmental law and environmental criminal law, which the Faculty of Law at Uppsala Universitet has been doing almost yearly for the National Prosecution Authority since 1992.

54 See e.g. the decision 2010-10-14 by the County Board of Gävleborg (dnr. 218-5781-14), allowing protecttive hunting of a wolf in the Homna area. The decision was sought by three individuals who applied for protective hunting as their dogs had been killed during hare hunting between 10 September and 1 October 2010. The applicants claimed it was impossible to hunt hare with unleashed dogs in the area. In its decision under the heading 'Preventative measures', the County Board found that there were no measures which fully prevented the wolf from killing competitors in the forest. It also pointed to the fact

55 SOU 2007:89 page 162. that another application for protective hunting of wolf in the area was rejected in June 2010. Finally, the Board approved the application by referring to the *need of gaining acceptance* for wolf population among the inhabitants of rural areas. In the last paragraph, the Board referred to what the government stated in the legislative procedure.

the *purpose of the measures* that the government has pursued, upon which I shall enlarge in the conclusions.

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 will judge the matter. I am of the opinion that it is mainly the 'small numbers' criterion in Article 16.1(e) that clearly favours the Commission. 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. I 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, I think the answer to the central question of this paper becomes clear: Article 16.1(e) is not about management hunting; its purpose is totally different. 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 seems in practice to be quite exceptional.[56]

The idea of giving Article 16.1(e) such a broad meaning 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.[57] 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 my belief, this comparison does not hold good because the situations of the various species 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. I 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 in relation 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'. An examination of the government's reasoning reveals two main defences for the wolf policy. First, the genetic; keeping the population low facilitates the possibility for genetic improvement. My understanding is that this standpoint is ecologically very controversial. Second, and this is the main argument, the policy improves public acceptance for the existence of wolves, which is crucial for the longterm 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 my 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 meas-

[56] Guidance Document 2007, page 56.
[57] Guidance Document 2007, page 57f.

ures 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, Article 2.3 is not an autonomous ground for derogation that exists alongside those in Article 16.[58] 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'.[59]

To summarize, I think that the Commission had a very strong case before the Swedish government's 'poodle' in August. What will happen now is harder to predict, but I will share some thoughts on the subject in my concluding remarks. However, before doing so, I wish to touch upon another topic that has been discussed in relation to Sweden's new wolf policy. It concerns the possibilities open for challenging hunting decisions in the courts.

Acces to justice: hunting decisions on appeal

The Commission raised the issue of access to justice in the initial communications. However, in the formal notice of January it merely passed as a subordinate clause, and the reasoned opinion is silent on the matter. I shall not therefore examine the matter in great detail. However, it requires comment because it is crucial to the effectiveness of EU control mechanisms with regard to the implementation legislation of Member States.

According to the Hunting Ordinance, hunting decisions are open to challenge in accordance with the general rule of appeal in the administrative legislation. In section 22 of the Act of Administrative Procedure (1986:223) the right to appeal belongs to those 'who are concerned' by a particular decision. From the traditional administrative procedural view-point, such people consist only of the applicant and the authority. Accordingly, decisions on protective hunting can only be appealed by the applicant – that is, the hunter. On decisions on management it must be regarded as being somewhat uncertain as to whether even hunters can appeal, as they are not applicants in these cases. If this is the case, no one can appeal those decisions. An early communication from the government in the infringement proceedings stated that it was anticipated in the legislative proposal to Parliament that the Environmental Protection Agency would be granted the right to appeal the hunting decisions of County Boards as a control mechanism. What the government failed to inform the Commission was that this proposal was not approved and never took effect.[60] As of yet, no such right exists for the national authority. Accordingly, in the Swedish legal system, no one can challenge hunting decisions regarding species protection.

The Aarhus Convention and Union law

This position is clearly problematic in relation to Sweden's international obligations. First of all, the lack of any access to justice for those who represent the interests of species protection – namely, the environmental NGOs – is in breach of the Aarhus Convention, more specifically Article 9.3. According to that provision, members of the public should enjoy the opportunity of access to administrative or judicial procedures in order to challenge any acts or omissions by private persons and public authorities that are believed to have contravened national law concerning the environment. The remedies thus demanded must be both adequate and effective, including the possibility of injunctive relief. They must also be fair, equitable, timely and not prohibitively expensive to pursue (Article 9.4). The validity of Article 9.3 on species protection was illustrated in a decision responding to a complaint against Denmark by the Convention's Compliance Committee in 2008. The complainant had claimed that he was denied access to justice because Danish law failed to afford him the means of challenging in court a municipality's decision on the culling of rooks (protected by the Birds Directive). However, the Committee said that

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58 C-247/85 *Com v. Belgium*, para 8.

59 Guidance Document 2007, page 53.

60 It is also noteworthy that SEPA has proposed that competence to decide on license hunting should be moved down to County Board level from 2012, see http://www.naturvardsverket.se/upload/04_arbete_med_naturvard/varg/vargflytt/2011/G-rapport-ru- kompensation.pdf on page 21.

the mere fact that the private person could not challenge such a decision did not constitute a breach of the Convention, but it also stated that *some member of the public must be able to do so*.[61]

The position of Union law is more complex. On the one hand, there is the case law of the Court of Justice on direct effect and the demand for primacy, and on the other, the notion of procedural autonomy – meaning that it is for Member States to develop their own systems for decision-making and judicial review. However, the national systems must be founded on the principles of equivalence and effectiveness. The meaning and intention of those principles is that there must be a possibility of a *fair trial* on the matter that is seen to be *effective*; that the procedure is not *less favourable* than those governing similar situations where there has been a breach of domestic legislation; and that the particular system does not *render it impossible* in practice, or excessively difficult, for the parties concerned to execute rights conferred under EU law.[62]

From the beginning the CJEU applied the idea of direct effect – that if provisions of EU directives are unconditional and sufficiently precise, they may be relied upon before a national court – only in relation to the 'rights' of individuals. The first cases on this question concerned competition, social security, consumer protection, and so on. In those situations there was typically an easily identified actor able to initiate the case. Early on, however, the Court also found that the doctrine of direct effect should be employed with respect to the individual's living environment and health protection.[63] This is also the perspective found in the literature on some EU law commentaries, both by Swedish and international legal scholars.[64] The examples mentioned there deal with the possibilities open to neighbours to rely on EU air and water Environmental Quality Standards when challenging alleged acts or omissions by environmental authorities.

However, in discussing nature conservation one cannot in truth talk of individual rights. The expression 'direct effect' under such circumstances describes instead a broader concept, dealing with the 'primacy of EC law'.[65] This principle was made evident by the Court of Justice in the *WWF* case, meaning that whenever a provision in a directive is found to be unconditional and sufficiently precise, it must be applied in preference to any national legislation inconsistent with it.[66] Other commentators on European environmental law therefore direct attention to the fact that the CJEU has found 'rights' in this area on all manner of provisions dealing with quality of the environment and the duties of public authorities. Those authors accordingly argue that the issue of 'rights' of individuals is a procedural rather than a substantive matter. To them, the concept of direct effect essentially means providing procedural mechanisms with which the public may challenge administrative decisions on the basis of environmental quality requirements that are clearly provided under EC law.[67]

Today this subject must be analysed from the perspective that not only the Member States of the Union, but also the Union itself, have all signed and ratified the Aarhus Convention. After the accession of the Convention, the development of a common standard in relation to access to justice in environmental matters has been rapid. A number of important cases have been decided by the Court of Justice concerning 'Aarhus issues', such as costs in the environmental procedure (C-427/07 *Irish costs*) and standing criteria for NGOs (C-263/08 *DLV* and C-115/09 *Trianel*). However, as the main issue when discussing species protection is that of the possibilities open to NGOs for representing the public interest, including its access to justice in matters within the purview of the Habitats Directive, the most interesting case is C-240/09 *LZ*. This judgment was given in Grand Chamber and undoubtedly constitutes a landmark case on the possibilities available to

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61 Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 32.

62 C-87/90 *Verholen,* p. 27, C-413/99 *Baumbast*.

63 CJEU case law has developed from the *TA Luft* cases of 1991 (C-361/88 and C-59/89) to the *Janecek* case in 2008 (C-237/07). For further analysis on this subject, see Darpö, J: Biological Diversity and the Public Interest (From de Lege 2009 (Yearbook of the Faculty of Law/Uppsala Universitet), page 201), also available at www.jandarpo.se/In English.

64 Mahmoudi, S: *EU:s miljörätt*. Norstedts Juridik, 2nd ed. 2002, page 245f., Michanek, G & Zetterberg, C: *Den svenska miljörätten*. Iustus, 2nd ed. 2008, page 96f, Krämer, L: *EC Environmental Law.* Thomson (Sweet & Maxwell), 6th ed. 2007, page 433.

65 See Prechal, S: *Directives in EC law*. Oxford University Press, 2:a uppl. 2005, s. 231 ff.

66 C-435/97 *WWF,* para 68 and 70, the latter introduced with the words (my italics): 'Consequently, if that discretion has been exceeded and the *national provisions must therefore be set aside on that account*, (…)'.

67 Jans & Vedder: *European Environmental Law*. Europa Law Publishing, 3rd ed. 2008, Chapter 6.

NGOs to use legal means to challenge decisions made in Member States in the field of environmental law.[68]

The Slovak case on the hunting of brown bear (C-240/09)

This case concerns decisions made by Slovak authorities to allow the hunting of the brown bear, a species which enjoys the same strict protection as the wolf under the provisions of the Habitats Directive. The decisions were challenged by an environmental NGO, Lesoochranárske zoskupenie VLK (LZ). However, the Slovak authorities and lower courts denied LZ status as 'a party to the proceedings'. The organisation appealed to the Slovak Supreme Court, which stayed the proceedings and asked for a preliminary ruling from the Court of Justice on three questions on Article 9.3 of the Aarhus Convention: Does that provision have the 'self-executing effect' of an international treaty? Does it have 'direct effect' according to Union law? Should the provision be interpreted so as to include a right for an environmental NGO to appeal a decision on the grounds that it contravenes national implementation law?

To begin with, it should be noted that in the declaration of competence at the approval of the Aarhus Convention, the Union made a reservation about Article 9.3, stating: 'Member States are responsible for the performance of these obligations (…) unless and until the Community,(…), adopts provisions of Community law covering the implementation of those obligations.' It was therefore necessary for the Court of Justice to decide whether it had competence to judge on the matter, something that was disputed by some Member States in their interventions in the case. The CJEU, however, replied in the affirmative. It found that the Aarhus Convention, signed and subsequently approved by the Community, was an integral part of the legal order of the European Union and that the Court therefore had jurisdiction to give preliminary rulings concerning the interpretation of the provisions therein.[69] The CJEU also held that since the brown bear enjoyed protection under the Habitats Directive and that the challenged decisions concerned the derogation possibilities from that protection, the dispute in the national proceedings fell within the scope of the system of EU law. Here, the Court stressed that it was clearly in the interests of EU law that such a provision should be interpreted uniformly, in order to forestall differences in the application.[70]

The Court went on to decide whether Article 9.3 had a self-executing effect in accordance with case law on 'mixed agreements'. Here the CJEU answered in the negative, as the provision does not contain a clear and precise obligation capable of directly regulating the legal position of individuals without the adoption of subsequent measures in national legislation. But having said this, the Court emphasised that the provision, though drafted in broad terms, was intended to ensure effective environmental protection. It was therefore for each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derived from EU law – in this case the Habitats Directive. Member States were responsible for ensuring that those rights were effectively protected in each case, safeguarding the above mentioned principles of equivalence and effectiveness. Therefore, Article 9.3 of the Aarhus Convention must not be interpreted in such a way so as to make it impossible in practice, or excessively difficult, to exercise the rights conferred under EU law.[71]

Finally, the CJEU explained what this meant in relation to the Habitats Directive and access to justice by NGOs. The Court stated that it was the responsibility of the national court, in order to ensure effective judicial protection in the fields covered by EU environmental law, to interpret its national law consistently in accordance with the objectives of Article 9.3 of the Aarhus Convention. Accordingly, the national court should interpret the procedural rules of the Member State, if possible, '*so as to enable an environmental protection organisation, such as the (LZ), to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law'*.[72]

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[68] It is also a landmark case concerning the effects of 'mixed agreements' within the Union, an issue that will not be discussed in any depth in this article. The question is very controversial, which can be seen from the divergent viewpoints of the Court of Justice and Advocate General, Eleanor Sharpston. For further debate, see *Jans*: Who is the Referee? Access to Justice in a Globalised Legal Order: A Case Analysis of ECJ Judgment C-240/09; http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1834102.

[69] Judgment para 30-31.

[70] Judgment para 37-38 and 42.

[71] Judgment para 45-49.

[72] Judgment para 51.

Conclusions in relation to the Swedish wolf hunt

In my view, this judgment really is a breakthrough for the public in the environmental field in Member States – including the NGOs – to enjoy access to justice in their demands under EU law. In this article on the Swedish wolf hunt, however, two conclusions are to be drawn. First of all, it will no longer be possible for the administrative courts to dismiss an appeal from environmental NGOs on a hunting decision for lack of standing.[73] The concept of 'public concerned' in Swedish environmental law is essentially formed by case law and it is entrusted to the courts to find its delimitations. We can therefore look forward to a development of jurisprudence along the same lines as the one in our neighbouring country Finland. Here, the Supreme Administrative Court (HFD) has regarded itself as the ultimate defender of Union law on nature conservation issues. With reference to the Finnish Constitution, where the protection of the environment is emphasised, and with reference to the Aarhus Convention, HFD has expanded the right of NGOs to appeal in situations where no such right previously existed.[74] It is worth mentioning that the most recent case dealt with a decision on hunting the wolf. Two regional environmental NGOs were granted leave to appeal, although the hunting legislation left no room for NGO access to justice. An important reason for the position of HFD was that someone must be able to challenge decisions concerning the implementation of EU law.

The second conclusion is more indirect. The judgment clearly brings about a Union law obligation for Member States to reform their environmental procedures in order to secure for NGOs the right to appeal decisions concerning the national implementation of EU law obligations, such as species protection. Accordingly, one can also argue that the Commission today has a much stronger reason for highlighting this question with Member States as soon as the opportunity arises. In my opinion, the infringement proceedings concerning the Swedish wolf policy clearly should have been such a situation. However, the Commission has chosen not to continue to pursue this issue, probably in order to speed up the procedure to be able to apply for a CJEU injunction to stop a coming decision on license hunting in 2012. Even if it is hard to criticize this standpoint, it also reveals the weakness in the system of enforcement of EU law obligations. A national legal system where decisions that breach Union law can never be brought before national courts – such as the Swedish hunting decisions – entail the consequence that the controversial issue cannot be referred to the Court of Justice for a preliminary ruling. Such an order means that the Commission becomes the ultimate interpreter of Union law and opens the way for negotiations with the Member State in question in closed sessions by way of 'package meetings'.[75] Such negotiations can be regarded as quite natural in the relationship between the Union entities and Member States, but obviously they may also have devastating consequences from the perspective of environmental democracy and the coherence of Union law in Member States. Moreover, it deprives the Court of Justice of its role as the highest interpreter of Union law. Not least, the Court itself has from time to time been very clear in emphasising this. At the end of the day, this might still not be a very convincing argument for the Commission to initiate an infringement proceeding on the matter. In my opinion, a more decisive factor is that the CJEU's statement in the Slovak case about the Union law obligation for access to justice also truly is an assignment of authority for the Commission to supervise and control the implementation of this obligation. Furthermore, one should be aware that the judgment paves the way for the public concerned to complain to the Aarhus Convention's Compliance Committee for deficiencies in access to justice in these situations. The Committee has already announced that the expression 'national law' according to Article 9.3 includes applicable Union law.[76] Accordingly, the public concerned must have the opportunity to effectively appeal any breach of Union law in the national systems.

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[73] A number of appeals have been made by NGOs and even individual landowners against both decisions on protective hunting and license hunting of wolves between 2009 and 2011. They were all dismissed by the Regional Administrative Courts, whereas leave to appeal was denied by the Administrative Courts of Appeal and the Supreme Administrative Court.

[74] HFD 2004:76 and HFD 2007:74.

[75] See Krämer in the article in JEEPL mentioned below in footnote 77.

[76] Communication ACCC/C/2008/18 (Denmark), ECE/MP.PP/2008/5/Add.4, 29 April 2008, para 59, reiterated in the Report 2008-05-22 to the third Meeting of the Parties (ECE/MP.PP/2008/5. para 65).

Closing remarks

In essence, I would argue that there are strong reasons for the Commission to take the infringement case all the way to the Court of Justice. However, argument from a legal scholar is one thing and everyday political reality another – with the two sometimes diverging greatly. This is perhaps best illustrated by the published figures on infringement proceedings. According to the statistics, the Commission receives about 700 complaints a year and deals with some 3,000 ongoing cases concerning complaints and infringement proceedings. Of this total, one-third relates to the environmental sector.[77] In 2009 about 77 per cent of all complaints were closed before the first formal step in an infringement proceeding; another 12 per cent were closed before the reasoned opinion; and a further seven per cent (approximately) before a ruling from the CJEU. If I understand the figures correctly, this means that out of the 23 per cent of all complaints where a formal notice was sent to the Member State, only four per cent reached court. Another not very promising figure concerns the time factor. In the *Finnish wolf case* (C-342/05) proceedings began with a formal notice in April 2001. The reasoned opinion came more than two years later in June 2002, and the Commission's referral to the Court of Justice in September 2005. In court, the Advocate General delivered her opinion in November 2006, with judgment delivered in June 2007. In all, between the formal notice and the judgment, more than six years had elapsed.[78]

Viewed against this statistical background, the prospects of a successful infringement case against Sweden may seem somewhat poor. One must also bear in mind that the Commission has an almost unlimited discretion on deciding when and why to take a case to the Court. I had, however, still predicted that an infringement proceeding would go all the way. That is essentially due to the fact that the Commission has a very strong case. But after the government's 'poodle' in late August, the case must be seen to have stalled, at least temporary. The reasoned opinion gave the Swedish government two months to show compliance. As the response was to cancel the set limit for wolves in the country and to change the prerequisites for the 2012 licensed hunt, matters have become more complicated. To be able to evaluate compliance, the Commission must at least wait for the SEPA guidelines on the expanded legal grounds for protective hunting under sections 23e and 24e of the Hunting Ordinance before any move can be made. The guidelines – to be delivered on 15 November – will reveal whether the new regime represents a real effort, or just a way of circumventing any action from the Commission. Even if the latter was precisely what the minister of the environment said at the press conference when he presented the package, I would prefer to regard that statement as just a political gambit for the public.[79]

Whether or not the new provisions on 'protective licensed hunting' under the Hunting Ordinance are in breach of the Habitats Directive is not that easy to evaluate today. What we know is that the 'license hunt', according to Swedish law, means the hunting of a certain number of animals in a defined geographical area within a specified time. The question is whether it is possible to operate such a hunt in compliance with the legal grounds of Article 16.1(b) of the Habitats Directive. As indicated earlier, outside of that provision there is no room for protective hunting, irrespective of the motives. We must also remember that the CJEU stated in the *Finnish wolf case* that such hunting was not permitted without specifically identifying those wolves deemed to have caused serious damage; the making of an assessment of the conservation status of the species; and the provision of a clear and sufficient statement of reasons on the absence of any satisfactory alternative.[80] From this beginning, I would say that there are a number of problems with the Government's new move. First, section 23e of the Hunting Ordinance goes well beyond the scope of Article 16.1(b) and the above mentioned case law of the CJEU. Although the directive talks about 'prevent serious damage', section 23e uses

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77 26th and 27th annual report on implementation of EU law (2008 and 2009), compared with Krämer: The environment complaint in EU law. Journal of European Environmental and Planning Law (JEEPL) 2009 page 13.

78 Still, this is not an extreme example. The Swedish case on water-scooters (C-142/05 *Mickelsson & Roos*) took *over four years in the Court of Justice* (the referral was done in March 2005 and the judgment issued in June 2009)!

79 The minister was heavily criticised in the Swedish media for his populist presentation at the press conference, claiming that he defended the local community against the decision-makers in Brussels, see, for example Dagens Nyheter 2011-08-19, http://www.dn.se/ledare/huvudledare/grodor-varg-och-val.

80 C-342/05 para 30-31 and 40-44.

the expression 'to prevent or reduce risk of harm caused by wolves', which actually is a wider concept. This impression is reinforced by the text of the assignment to SEPA, which gives one the impression that any kind of negative impact on economic activities in the forests would amount to a justified cause for protective hunting. Second, Article 16.1(b) is already implemented literally by a specific provision in the Swedish legislation, section 23a of the Hunting Ordinance. Section 23e is a substantive provision that seems to add more room for protective hunting – although labelled as 'license hunt' – something which clearly breaches the Habitat Directive. Third, SEPA issues guidelines for the County Administrative Boards to apply in their decision-making under section 23e. This is quite different from the system evaluated by the CJEU in the *Finnish wolf case*. There, the regional bodies decided on protective hunting according to the Habitat Directive within a certain limit that was set by the national authorities. Here, even if there will be an upper limit, the derogation possibilities seems to be widened. One should also remember that the regional decisions on protective/license hunting cannot be challenged in court by anyone from a conservationist´s point of view, neither the SEPA, nor the environmental NGOs.

Having said this, I still contend that the new legislation on 'license hunt' under section 23e of the Hunting Ordinance cannot be fully evaluated until the guidelines are announced. It is possible that the Commission might even have to wait for the first decisions of 2012 to gain the full picture, especially as the new provisions will be generally applicable to all large carnivores. Furthermore, we do not know how serious the plans are to return to ordinary licensed hunting in 2013. In fact, we might find ourselves in a similar situation in the middle of 2012 to the one we have experienced this summer. Taken together, these factors suggest that the infringement case will neither be taken to court this year nor even the beginning of next. The course of events might even show that it was a tactical mistake on the part of the Commission to confine its action to Article 16.1(e). In the long run, the sensitive point might prove to be the administrative practice of the County Administrative Boards on protective hunting. As shown above, there are already clear signs that this practice can be quite excessive – for example, to protect unleashed hunting dogs. According to the minister of agriculture, who acted together with the minister of the environment at the press conference, the protection of hunting dogs is one of the interests to be upheld by the new legislation. If this happens, I assume that the Commission will have to widen the scope of its legal action against Sweden. If so, I would hope the lack of access to justice would be included in the proceedings, emphasising the fact that in Sweden *no one* can challenge decisions on species protection in court, not even if they contravene our Union law obligations. In the political climate of Sweden today, I would say that the Commission's action on this issue is the only right and proper way to ensure that administrative decisions on the matter can be brought to court, and thus ultimately to the Court of Justice. Even if this is not realised in this infringement case, the continuing story on wolf policy in Sweden will be of the utmost interest, not least from a Union law perspective.

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