

Killing Wolves Legally: Exploring the Scope for Lethal Wolf Management under European Nature Conservation Law

Arie Trouwborst & Floor M. Fleurke

To cite this article: Arie Trouwborst & Floor M. Fleurke (2019): Killing Wolves Legally: Exploring the Scope for Lethal Wolf Management under European Nature Conservation Law, Journal of International Wildlife Law & Policy, DOI: [10.1080/13880292.2019.1686223](https://doi.org/10.1080/13880292.2019.1686223)

To link to this article: <https://doi.org/10.1080/13880292.2019.1686223>



© 2019 Taylor & Francis Group, LLC



Published online: 18 Nov 2019.



Submit your article to this journal [↗](#)



View related articles [↗](#)




View Crossmark data [↗](#)

Killing Wolves Legally: Exploring the Scope for Lethal Wolf Management under European Nature Conservation Law

Arie Trouwborst and Floor M. Fleurke

1. Introduction

Around Christmas 2017, a young female wolf (*Canis lupus*) of German birth, wearing an electronic tracker, explored the Netherlands for a few weeks and then walked into Belgium, where it became the first confirmed wild wolf on Flemish soil in over a century.¹ Other recent milestones include the establishment of the first Danish wolf pack in centuries;² the first confirmed wolf presence in Luxembourg after another long absence;³ and a string of wolf sightings in the Netherlands over the last few years, with various wolves establishing territories in the course of 2018, and the first pups born in 2019.⁴ These are just some of the latest events in a European wolf comeback that has been unfolding in recent decades. After having been extirpated from large parts of Europe in the past, wolves are on the rebound and have resettled countries such as Sweden, France, and Germany. This recovery has been enabled through a combination of social, cultural, economic, and ecological circumstances, and has been aided by wildlife conservation legislation at national and international levels.⁵ Of the

*Arie Trouwborst and Floor Fleurke are both associate professors with the Department of Public Law and Governance of Tilburg Law School in the Netherlands. Contact: Arie Trouwborst, Department of Public Law and Governance, Tilburg Law School, PO Box 19053, 5000 LE, Tilburg, The Netherlands. Email:  a.trouwborst@tilburguniversity.edu.

¹Daniel Boffey, *Pioneering Wolf Becomes First Sighted in Belgium for a Century*, THE GUARDIAN, 22 January 2018, <http://www.theguardian.com/environment/2018/jan/22/pioneering-female-becomes-first-wolf-in-belgium-in-a-century>. It settled, was joined by a mate, got pregnant, and then vanished—probably illegally killed. AFP, *Belgium's First Sighted Wolf in a Century Feared Killed by Hunters*, THE GUARDIAN, 2 October 2019, <http://www.theguardian.com/environment/2019/oct/02/belgiums-first-sighted-wolf-in-a-century-feared-killed-by-hunters>

²Patrick Barkham, *Denmark Gets Its First Wild Wolf Pack in 200 Years*, THE GUARDIAN, 4 May 2017, <http://www.theguardian.com/environment/2017/may/04/denmark-gets-its-first-wild-wolf-pack-in-200-years>.

³Barbara Tasch, *First Official Proof of Wolf in Luxembourg Since 1893*, LUXEMBOURG TIMES, 1 September 2017, <http://luxtimes.lu/archives/1112-first-official-proof-of-wolf-in-luxembourg-since-1893>.

⁴Anne-Marie Bullock, *Wolves Return to Netherlands After 140 Years*, BBC News, 9 April 2019, <http://www.bbc.com/news/science-environment-47838162>; Mike Corder, *The Return of the Wolf: Wild Cubs Born in the Netherlands*, PHYS.ORG, 20 June 2019, <https://phys.org/news/2019-06-wolf-wild-cubs-born-netherlands.html>.

⁵John Linnell & Luigi Boitani, *Building Biological Realism into Wolf Management Policy: The Development of the Population Approach in Europe*, 23 HYSTRIX, ITALIAN J. OF MAMMALOGY 80 (2012); Luigi Boitani & John Linnell, *Bringing Large Mammals Back: Large Carnivores in Europe*, in REWILDING EUROPEAN LANDSCAPES 67 (Miguel Pereira & Laetitia © 2019 The Author(s). Published with license by Taylor & Francis Group, LLC
This is an Open Access article distributed under the terms of the Creative Commons Attribution-NonCommercial-NoDerivatives License (<http://creativecommons.org/licenses/by-nc-nd/4.0/>), which permits non-commercial re-use, distribution, and reproduction in any medium, provided the original work is properly cited, and is not altered, transformed, or built upon in any way.

latter, the most significant are the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)⁶ and the EU's 1992 Directive on the Conservation of Natural Habitats and of Wild Fauna and Flora (Habitats Directive).⁷ Currently, Europe is home to ten distinct (sub)populations of wolf⁸—or nine, once the Sierra Morena population in southern Spain has been confirmed as extinct.⁹ Eight of these populations are transboundary, i.e., shared by more than one country, and most of them display positive population trends,¹⁰ even if illegal killing remains an important source of wolf mortality across Europe.¹¹

As wolf populations continue to expand across the continent, public authorities face challenges in finding ways to accommodate the recovery of wolf populations with the need to foster coexistence and minimize conflicts with human interests. In particular, in many areas where wolves have returned or are increasing in numbers, this has led to a desire by parts of the (rural) public to introduce some form of regulated lethal control of wolves, through either culling by state employees or hunting conducted by rural hunters, and many European states have taken action to that end.¹² Introducing such measures can be very controversial, and critics have tended to challenge their legality under the international wildlife conservation instruments that have nurtured wolf recovery, in particular the Bern Convention and Habitats Directive. Specific legal issues concern the killing of wolves to prevent economic damages, killing to ensure acceptance or tolerance of wolves, killing as part of a quota system, and how the killing of wolves relates to population size and conservation status.

Navarro eds., 2015); Floor Fleurke & Arie Trouwborst, European Regional Approaches to the Transboundary Conservation of Biodiversity: The Bern Convention and the EU Birds and Habitats Directives, in *TRANSBOUNDARY GOVERNANCE OF BIODIVERSITY* 128 (Louis Kotzé & Thilo Marauhn eds., 2014); Guillaume Chapron et al., *Recovery of Large Carnivores in Europe's Modern Human-Dominated Landscapes*, 346 *SCIENCE* 1517 (2014).

⁶19 September 1979, E.T.S. 104.

⁷Council Directive 92/43/EEC, 21 May 1992.

⁸Petra Kaczensky et al., Status, Management and Distribution of Large Carnivores—Bear, Lynx, Wolf and Wolverine—in Europe (European Commission 2013); Chapron et al., *supra* note 5; Luigi Boitani et al., Key Actions for Large Carnivore Populations in Europe (European Commission 2015).

⁹José Vicente López-Bao et al., *Toothless Wildlife Protection Laws*, 24 *BIODIVERSITY AND CONSERVATION* 2105–2108 (2015); Arie Trouwborst, *The EU Habitats Directive and Wolf Conservation and Management on the Iberian Peninsula: A Legal Perspective*, 26 *GALEMYS—SPANISH JOURNAL OF MAMMALOGY* 15 (2014); José Vicente López-Bao et al., *Legal Obligations Regarding Populations on the Verge of Extinction in Europe: Conservation, Restoration, Recolonization, Reintroduction*, 227 *BIOLOGICAL CONSERVATION* 319 (2019).

¹⁰Kaczensky et al., *supra* note 8; Chapron et al., *supra* note 8; Boitani et al., *supra* note 8.

¹¹Olof Liberg et al., *Shoot, Shovel and Shut Up: Cryptic Poaching Slows Restoration of a Large Carnivore in Europe*, 279 *PROCEEDINGS OF THE ROYAL SOCIETY B* 910 (2012); López-Bao et al., *supra* note 9.

¹²John Linnell et al., *When Is It Acceptable to Kill a Strictly Protected Carnivore? Exploring the Legal Constraints on Wildlife Management within Europe's Bern Convention*, 12 *NATURE CONSERVATION* 129 (2017); LUPUS Institut für Wolfsmonitoring und –forschung in Deutschland, *Übersicht über Legale Wolfsabschüsse und die Zugrunde Liegende Argumentation in Ausgewählten Europäischen Ländern* (Sächsisches Staatsministerium für Umwelt und Landwirtschaft 2016) (on file with the authors).

Without going into the complexities regarding the desirability and utility of lethal wolf management as such, in this article we aim to address these legal issues, and fundamentally seek to identify to what extent, and under what conditions, lethal wolf management can be conducted without violating the applicable European legal frameworks, in particular the Habitats Directive.¹³ Below, the overarching Bern Convention and the Habitats Directive are first introduced from a wolf conservation and management perspective, followed by specific analyses of the aforementioned legal issues.

International and European legal research methodology is the primary research method used in this article. This methodology consists, in particular, of the identification and analysis of relevant legal instruments and their provisions, including their interpretation according to the applicable rules from the international law of treaties as codified in the 1969 Convention on the Law of Treaties (Vienna Convention),¹⁴ and as refined with regard to EU law by the Court of Justice of the EU (CJEU), while also taking account of guidance provided by the European Commission. Furthermore, all EU member states and the EU itself are contracting parties to the Bern Convention, and the Habitats Directive must therefore be interpreted consistently with it.

A note on terminology is in order. Often, the notions of “taking” and “hunting” are used as substitutes for “killing.” The former terms carry various complex connotations, which may vary according to the audience and context involved, but in either case “killing” is the legally relevant action within the scheme of the species protection provisions of the Habitats Directive. To avoid unnecessary confusion, therefore, this article primarily employs the term “killing,” rather than “taking” or “hunting.”

Whereas the focus of our analysis is on wolves, large parts of it will be relevant for other large carnivores too, such as brown bears (*Ursus arctos*) and Eurasian lynx (*Lynx lynx*), and to some degree also for other species covered by the Habitats Directive.

2. Wolves and the Bern Convention

The Bern Convention’s aims are “to conserve wild flora and fauna and their natural habitats, especially those species and habitats whose conservation requires the co-operation of several States, and to promote such co-operation,” giving particular emphasis to “endangered and vulnerable

¹³For a similar analysis addressing some of these issues for the Bern Convention, see Linnell *et al.*, *supra* note 12. For some thoughts on the utility of lethal wolf management and other management approaches, see Dries Kuijper *et al.*, *Keep the Wolf from the Door: How to Conserve Wolves in Europe’s Human-Dominated Landscapes?*, 235 BIOLOGICAL CONSERVATION 102.

¹⁴23 May 1969, 1155 UNTS 333.

species.”¹⁵ A general obligation that applies to all wildlife, including wolves, requires parties to “take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements and the sub-species, varieties or forms at risk locally.”¹⁶ The required population level will vary according to the circumstances, but at the very least populations must be kept out of danger of extinction.¹⁷

Regarding habitat conservation, the Convention obliges parties to “take appropriate and necessary legislative and administrative measures to ensure the conservation of the habitats” of wild fauna species, especially of those listed in Appendix II, to “avoid as far as possible any deterioration” of those habitats.¹⁸ Based on these obligations, the Emerald Network of Areas of Special Conservation Interest (ASCI) has been developed, as a protected area network equivalent to the Natura 2000 network set up under the Habitats Directive, and complementing it beyond the EU.

Regarding generic species protection, the Bern Convention requires its parties to take “appropriate and necessary legislative and administrative measures” to ensure the “protection” of Appendix III fauna¹⁹ and the “special protection” of Appendix II fauna.²⁰ The latter special protection entails the prohibition of, *inter alia*, the deliberate killing, capturing, and disturbing of individual animals belonging to listed taxa. Regarding both sets of species, parties must prohibit the use of “all indiscriminate means of capture and killing and the use of all means capable of causing local disappearance of, or serious disturbance to, populations of a species,” and in particular the means mentioned in Appendix IV—including snares and poisoned baits.²¹ Exceptions to the various prohibitions may be authorized, but only when the conditions laid down in Article 9 of the Convention are met, which are discussed below.

Parties are committed to “co-operate whenever appropriate and in particular where this would enhance the effectiveness of measures taken under other articles” of the Convention.²² Finally, parties are permitted to file

¹⁵Bern Convention, *supra* note 6, art. 1.

¹⁶*Id.* art. 2.

¹⁷Michael Bowman *et al.*, Lyster’s International Wildlife Law (2d ed., 2010) 300; Arie Trouwborst *et al.*, *Norway’s Wolf Policy and the Bern Convention on European Wildlife: Avoiding the “Manifestly Absurd”*, 20 J. OF INT’L WILDLIFE L. & POL’Y 155 (2017).

¹⁸Bern Convention, *supra* note 6, art. 4.

¹⁹*Id.* art. 7.

²⁰*Id.* art. 6.

²¹*Id.* art. 8.

²²*Id.* art. 11.

Table 1. Bern Convention Standing Committee Recommendations applicable to wolves

Recommendation	Topic
No. 17 (1989)	Wolf
No. 74 (1999)	Large carnivores (five species), Action Plans
No. 82 (2000)	Large carnivores (five species), Action Plans follow-up
No. 100 (2003)	Large carnivores, Carpathians
No. 115 (2005)	Large carnivores, transboundary populations
No. 137 (2008)	Large carnivores, population level management
No. 162 (2012)	Large carnivores, populations requiring special attention
No. 163 (2012)	Large carnivores, expanding populations
No. 173 (2014)	Wolf-dog hybrids

reservations upon becoming a contracting party, to the effect of excluding certain species or means of capture and killing from the scope of some of their obligations under the Convention.²³

The aforementioned obligations have come to be informed by numerous decisions (Resolutions and Recommendations) adopted by the Standing Committee, the Bern Convention's main treaty body in which all parties are represented. These decisions are not legally binding themselves, but they do exercise an influence on the interpretation and application of the binding treaty obligations. A long and diverse track record on large carnivores has been built up over the years under the Convention, as reflected in the adoption of at least nineteen Standing Committee Recommendations expressly addressing large carnivore issues, nine of which apply to wolves (see Table 1).

The wolf is listed as a specially protected species in Appendix II of the Convention. However, fourteen contracting parties have submitted reservations affecting the legal status of the wolf. In two of these countries (Lithuania and Spain) wolves are subject to the flexible protection regime of Appendix III. In the other twelve reserving states (Belarus, Bulgaria, Czech Republic, Finland, North Macedonia, Georgia, Latvia, Poland, Slovakia, Slovenia, Turkey, Ukraine), wolves have the status of a completely unlisted species for the purposes of the Bern Convention. The result is a jurisdictional patchwork whereby the legal status of wolves often varies from one country to another (see Figure 1).

3. Wolves and the Habitats Directive

The Habitats Directive's objective is the maintenance or achievement of a "favourable conservation status" for the species and natural habitat types it covers, in order to contribute to biodiversity conservation in Europe.²⁴ All measures taken by EU member states pursuant to the Directive "shall be

²³*Id.* art. 22.

²⁴Habitats Directive, *supra* note 7, art. 2.

Wolf *Canis lupus* - Bern Convention

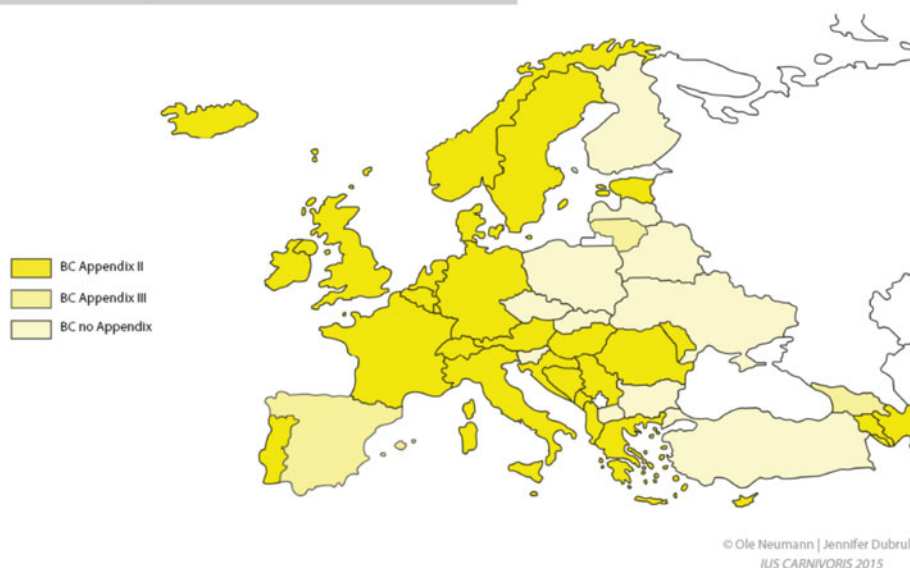


Figure 1. The legal status of wolves under the Bern Convention (by Ole Neumann & Jennifer Dubrulle, *Ius Carnivoris*, 2015).

designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.”²⁵ The status of a species is deemed favourable when, *inter alia*, the species “is maintaining itself on a long-term basis as a viable component of its natural habitats” and “there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.”²⁶ As with the Bern Convention, member states’ principal obligations concern area protection, on the one hand, and generic species protection, on the other. These roughly coincide with the Convention provisions outlined above, although the Directive’s provisions on area protected are much more detailed.

The wolf is one of the “species of Community interest” covered by those obligations. Yet due to a significant number of country-specific exceptions, different legal regimes apply to wolves depending on their location within the EU. Indeed, the legal status of an individual wolf may switch from strictly protected to huntable and vice versa upon crossing an international border, a river (in Spain), or even a latitudinal parallel (in Greece). The wolf figures, as a “priority species,” in Annex II of the Directive, which

²⁵*Id.* art. 2(1).

²⁶*Id.* art. 1(i); see also Yaffa Epstein et al., *A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe*, 9 CONSERVATION LETTERS 81 (2016); Yaffa Epstein, *Favourable Conservation Status for Species: Examining the Habitats Directive’s Key Concept through a Case Study of the Swedish Wolf*, 28 J. OF ENVYL. L. 221 (2016); Arie Trouwborst et al., *Interpreting “Favourable Conservation Status” for Large Carnivores in Europe: How Many Are Needed and How Many Are Wanted?*, 26 BIODIVERSITY AND CONSERVATION 37 (2017); and Section 6.1 below.

Wolf *Canis lupus* - Habitats Directive

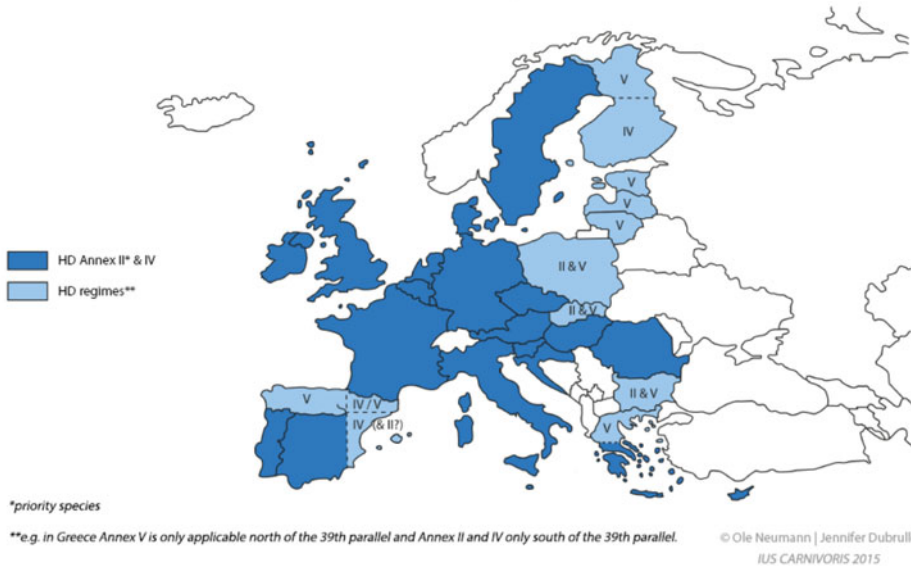


Figure 2. The legal status of wolves under the Habitats Directive (by Neumann & Dubrulle, *Ius Carnivoris*, 2015).

enumerates species for which “Special Areas of Conservation” (SAC) must be designated and protected, as part of the Natura 2000 network.²⁷ The Annex II regime does not, however, apply to Finland, Estonia, Greece (north of the 39th parallel), Latvia, Lithuania, and Spain (north of the Duero River²⁸).

In the sphere of generic species protection, Annex IV lists species that are to be strictly protected, whereas a more flexible regime applies to species included in Annex V.²⁹ Wolves have strictly protected Annex IV status in most member states, but they have Annex V status instead in Bulgaria, Estonia, Latvia, Lithuania, Poland, Slovakia, and parts of Greece (north of the 39th parallel), Finland (reindeer management area), and Spain (north of the Duero River³⁰). Figure 2 shows where the various Directive regimes apply. The varying legal status of wolves under the Habitats Directive combined with their varying status under the Bern Convention results in a highly complex and fragmented legal landscape, portrayed in Figure 3.

In light of this fragmented legal landscape and the transboundary nature of most wolf populations, transboundary cooperation at the population

²⁷Habitats Directive, *supra* note 7, arts. 4 & 6.

²⁸See also Trouwborst, *supra* note 9.

²⁹Habitats Directive, *supra* note 7, arts. 12–16.

³⁰See Trouwborst, *supra* note 9.

Wolf *Canis lupus* - Bern Convention & Habitats Directive

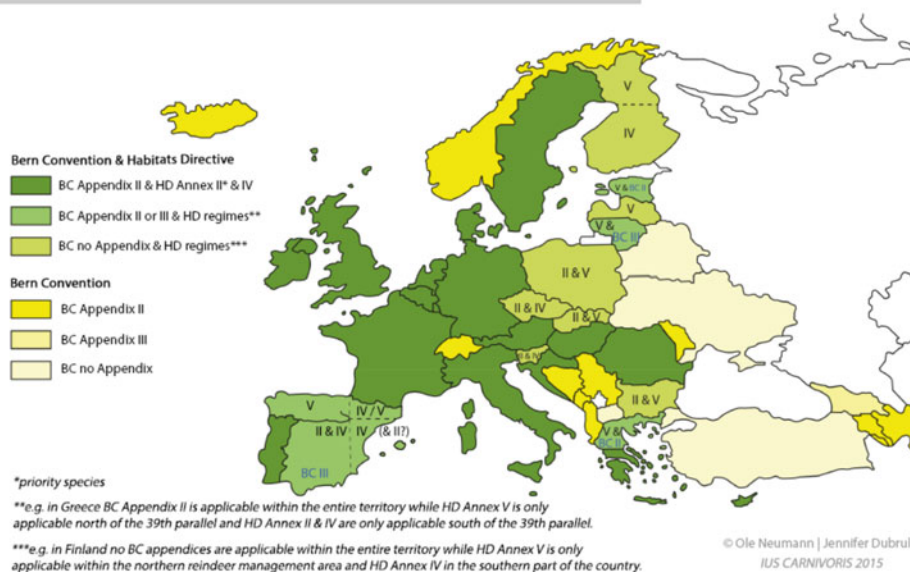


Figure 3. The legal status of wolves under the Bern Convention and the Habitats Directive (by Neumann & Dubrulle, *Ius Carnivoris* 2015).

level has become a leading paradigm for large carnivore conservation under the Bern Convention and the Habitats Directive alike.³¹ In the words of the Standing Committee, parties to the Convention ought to “re-enforce co-operation with neighboring states in view of adopting harmonised policies towards management of shared populations of large carnivores.”³² The European Commission has similarly urged EU member states sharing a large carnivore population to develop and implement integrated management plans adjusted to the level of the transboundary population.³³ The Commission issued a guidance document for this purpose to help member states draw up such plans (hereinafter referred to as the Carnivore Guidelines).³⁴

The three legal regimes associated with each of the three Annexes of the Habitats Directive are now concisely introduced.

³¹ John Linnell et al., *Guidelines for Population Level Management Plans for Large Carnivores in Europe* (European Commission 2008); Juan Carlos Blanco, *Towards a Population Level Approach for the Management of Large Carnivores in Europe: Challenges and Opportunities* (European Commission 2013); Ilka Reinhardt et al., *A Review of Wolf Management in Poland and Germany with Recommendations for Future Transboundary Collaboration* (Bundesamt für Naturschutz 2013); Arie Trouwborst, *Global Large Carnivore Conservation and International Law*, 24 *BIODIVERSITY AND CONSERVATION* 1567 (2015); S.A. Jeanetta Selier et al., *The Legal Challenges of Transboundary Wildlife Management at the Population Level: The Case of a Trilateral Elephant Population in Southern Africa*, 19 *J. OF INT'L WILDLIFE L. & POL'Y* 101 (2016); Trouwborst et al., *supra* note 17; Trouwborst et al., *supra* note 26.

³² Bern Convention Standing Committee Recommendations, No. 137 (2008).

³³ *Note to the Guidelines for Population Level Management Plans for Large Carnivores* (European Commission 2008).

³⁴ Linnell et al., *supra* note 31.

3.1. The Regime of Annex II

The Annex II regime is applicable to wolves in most EU member states (Figure 2). It requires the designation of SACs for wolves³⁵ and the protection of these sites according to Article 6 of the Directive. Whereas allegedly no protected area or Natura 2000 site in Europe on its own is large enough to ensure the persistence of a viable wolf population,³⁶ such protected areas obviously do play a role in wolf conservation.

For designated SACs, the Directive requires the member states' authorities to take "the necessary conservation measures" that "correspond to the ecological requirements" of the species involved.³⁷ With regard to wolves, this may entail ensuring the availability of sufficient wild prey and of forest patches for refuge and denning. In addition, for prospective and designated SACs selected for wolves, member states are required to "take appropriate steps to avoid" any significant "disturbance" (a broad term), and any deterioration of wolf habitat.³⁸ Lastly, any project or plan that is potentially harmful to the conservation of the wolves within a Natura 2000 site selected for wolves is subject to a restrictive authorization scheme.³⁹

An extensive CJEU jurisprudence has evolved regarding these area protection rules, with an overall tendency to interpret the rules in such a way as to maximize their effectiveness in light of the Directives' objectives.⁴⁰ Overall, the Directive's Annex II regime may thus have consequences for, *inter alia*, mining activities, the construction of highways and other infrastructure, the erection of fences, the construction of wind turbines, and other activities in or nearby wolf SACs.⁴¹

Importantly, Articles 6(1) and 6(2) must both be considered as laying down obligations of outcome rather than effort.⁴² In other words, member states must do what it takes to conserve the species involved within the corresponding Natura 2000 sites. To illustrate, if a member state tolerates

³⁵Habitats Directive, *supra* note 7, art. 4.

³⁶Luigi Boitani & Paolo Ciucci, *Wolf Management across Europe: Species Conservation without Boundaries*, in A NEW ERA FOR WOLVES AND PEOPLE: WOLF RECOVERY, HUMAN ATTITUDES, AND POLICY 15 (Marco Musiani *et al.* eds., 2009); see also Tom A. Diserens *et al.*, *Deficiencies in Natura 2000 for Protecting Recovering Large Carnivores: A Spotlight on the Wolf Canis lupus in Poland*, 12(9) PLOS ONE e0184144 (2017).

³⁷Habitats Directive, *supra* note 7, art. 6(1).

³⁸*Id.* art. 6(2).

³⁹*Id.* art. 6(3)–(4).

⁴⁰E.g., CJEU Case C-127/02, *Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v. Staatssecretaris van Landbouw, Natuurbeheer en Visserij*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-127/02#> (7 September 2004).

⁴¹Trouwborst, *supra* note 9.

⁴²E.g., CJEU Case C-96/98, *Commission of the European Communities v. French Republic*, <http://curia.europa.eu/juris/celex.jsf?celex=61998CJ0096&lang1=en&type=TEXT&ancre=> (25 November 1999); CJEU Case C-117/00, *Commission of the European Communities v. Ireland*, <http://curia.europa.eu/juris/celex.jsf?celex=62000CJ0117&lang1=en&type=TEXT&ancre=> (13 June 2002).

the poaching of wolves in or around SACs designated for the species, it has not met its obligation under Article 6(2) to avoid “significant disturbance.” The latter term is to be interpreted broadly, as including “[a]ny event which contributes to the long-term decline of the population of the species on the site.”⁴³ The term thus clearly covers the illegal killing of wolves. When member state authorities take insufficient action to curb poaching affecting wolves in SACs designated for the species, this amounts not only to a breach of their obligations under Article 6, but also of Article 12 where it applies, as discussed below.

3.2. The Regime of Annex IV

The strict protection regime of Annex IV applies to wolves in most member states (Figure 2). Under Article 12(1) of the Habitats Directive, the authorities in these member states are required to “take the requisite measures to establish a system of strict protection” for these wolves. In particular, prohibitions must be put in place on, *inter alia*, the killing, capturing, and disturbing of individual wolves, and on the “deterioration or destruction of breeding sites or resting places.” This protection is generic, applying both within and outside SACs. The obligation of Article 12(1) is a demanding one. Not only must the acts in question be prohibited, but the authorities must also take all measures necessary to ensure that the prohibitions are not violated in practice.⁴⁴ Authorities are thus under a duty to take all measures necessary to prevent the (illegal) killing of wolves and to protect their denning sites.

Exemptions from the above prohibitions may not be granted unless all of the three conditions laid down in Article 16(1) are met. First, such derogations may be allowed only for one of the purposes enumerated in this provision, namely:

- a. in the interest of protecting wild fauna and flora and conserving wild habitats;
- b. to prevent serious damage, in particular to crops, livestock, forests ... and other types of property;
- c. in the interest of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature ...;

⁴³European Commission, *Managing Natura 2000 Sites: The Provisions of Article 6 of the “Habitats” Directive 92/43/EEC* (European Commission 2000).

⁴⁴See Case C-103/00, *Commission of the European Communities v. Hellenic Republic*, <http://curia.europa.eu/juris/celex.jsf?celex=62000CJ0103&lang1=en&type=TXT&ancre=> (30 January 2002); CJEU Case C-518/04, *Commission of the European Communities v. Hellenic Republic*, <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0518&lang1=en&type=TXT&ancre=> (16 March 2006); CJEU Case C-221/04, *Commission of the European Communities v. Kingdom of Spain*, <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0221&lang1=en&type=TXT&ancre=> (8 May 2006).

- d. for the purpose of research and education, of repopulating and re-introducing these species ...;
- e. to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens ... in limited numbers specified by the competent national authorities.

Second, satisfactory alternatives must be absent. Third, a derogation may not hinder the maintenance or achievement of a favourable conservation status. These three conditions are discussed in more detail below.

According to the CJEU, Article 12(1) of the Habitats Directive “requires the Member States not only to adopt a comprehensive legislative framework but also to implement concrete and specific protection measures,” whereas likewise the provision presupposes the “adoption of coherent and coordinated measures of a preventive nature.”⁴⁵ Court and Commission both recommend species action plans, “on condition that they are correctly established and applied,” as effective means of implementing the requirements of Article 12; without such plans or similarly comprehensive and species-specific measures, “the system of strict protection contains gaps” amounting to a violation of the Directive.⁴⁶ For example, in a case concerning hamsters in France, the Court determined that “by failing to establish a programme of measures to ensure strict protection of the European hamster (*Cricetus cricetus*), the French Republic has failed to fulfil its obligations under Article 12(1)(d) of the Habitats Directive” regarding breeding sites and resting places.⁴⁷ A comprehensive and focused set of measures for wolves is thus required under EU law where Annex IV applies, and species protection plans are recommended to give this shape. Ideally, as discussed above, such wolf plans at the regional and/or national level should be embedded within a (transboundary) population-level management plan involving all countries sharing the population.

The Habitats Directive also requires member states to guarantee that surveillance of species covered by the Directive “is undertaken systematically and on a permanent basis,” with “particular regard to ... priority species” like the wolf.⁴⁸ This duty applies to all wolves, regardless of whether Annex IV or V applies. Where Annex IV applies, an additional specific obligation to monitor “incidental capture and killing” must be observed, with member

⁴⁵CJEU Case C-183/05, *Commission of the European Communities v. Ireland*, <http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0183&lang1=en&type=TXT&ancre=> (11 January 2007).

⁴⁶*Id.*

⁴⁷CJEU Case C-383/09, *European Commission v. French Republic*, <http://curia.europa.eu/juris/celex.jsf?celex=62009CJ0383&lang1=en&type=TXT&ancre=> (9 June 2011).

⁴⁸Habitats Directive, *supra* note 7, art 11; CJEU Case C-6/04, *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland*, <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0006&lang1=en&type=TXT&ancre=> (20 October 2005).

states being required to take the conservation measures necessary to ensure that such incidental killing does not have a “significant negative impact” on the species involved.⁴⁹ A pertinent example of such incidental killing is mortality in traffic.

3.3. The Regime of Annex V

Annex V of the Habitats Directive covers “Animal and plant species of Community interest whose taking in the wild and exploitation may be subject to management measures.” Where Annex V applies to wolves (see Figure 2), authorities have significantly more leeway as regards the tools they may use to conserve and manage wolf populations than in the areas covered by Annex IV. The prohibitions of killing and capturing just discussed are not required. The Directive enumerates a number of measures that may be applied by member states to regulate the exploitation of Annex V populations—for instance, closed seasons and license systems.⁵⁰ Yet these are presented as options rather than obligations.

That said, the discretionary room for authorities regarding wolves that are subject to Annex V is not unlimited. First and foremost, there is a general obligation to ensure a favourable conservation status.⁵¹ Second, the aforementioned monitoring duty applies, requiring permanent and systematic surveillance.⁵² Third, the Directive outlaws the use of certain means and modes of capture and killing in respect of wolves, including poison(ed baits), (semi-)automatic weapons, and all other “indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations.”⁵³ Exceptions to allow such means may only be made under the three conditions set out in Article 16, as mentioned above and discussed below.

A response given by the European Commission to a question in the European Parliament in 2013 may serve as an illustration. Here, the Commission addressed the compatibility with the Habitats Directive of the—rather controversial—culling of wolves within the National Park “Picos de Europa,” located in a part of Spain where Annex V

⁴⁹Habitats Directive, *supra* note 7, art. 12(4).

⁵⁰*Id.* art. 14.

⁵¹CJEU Case C-75/01, *Commission of the European Communities v. Grand Duchy of Luxembourg*, <http://curia.europa.eu/juris/celex.jsf?celex=62001CJ0075&lang1=en&type=TEXT&ancre=> (13 February 2003); European Commission, *Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive 92/43/EEC* (2007); Agustín García Ureta, DERECHO EUROPEO DE LA BIODIVERSIDAD: AVES SILVESTRES, HÁBITATS Y ESPECIES DE FLORA Y FAUNA (2010); Arie Trouwborst, *Living with Success—and with Wolves: Addressing the Legal Issues Raised by the Unexpected Homecoming of a Controversial Carnivore*, 23 EUR. ENERGY AND & ENVTL. L. REV. 89 (2014).

⁵²Habitats Directive, *supra* note 7, art. 11.

⁵³*Id.* art. 15.

applies.⁵⁴ In the words of the Commission, these “wolf culls are permissible as long as this is compatible with the conservation status of the species and provided that this does not prevent the achievement of the ecological requirements of the habitats and other species for which the areas have been designated.”⁵⁵

4. Creating Flexibility by Changing the Wolf’s International Legal Status

4.1. Changing the Status of Wolves under the Habitats Directive

From the perspective of member state authorities looking for (more) flexibility as regards lethal wolf management, particularly where the strict protection regime of Annex IV applies to wolves, a logical first question to be explored is what the prospects are of changing the provisions of the Habitats Directive and/or the status of wolves under the Directive.

Regarding the former, the amendment of the provisions of the Directive themselves, such as the text of Article 16, appears improbable in the foreseeable future. As part of the Commission’s “Fitness Check,” the Habitats Directive has recently been elaborately assessed and declared fit for purpose in its current shape.⁵⁶

Yet even if the Directive text remains unchanged, there is still the possibility to amend its Annexes. Evidently, moving wolves from Annex IV to Annex V would provide authorities with significantly more flexibility for wolf management involving lethal control (and similar considerations apply regarding Appendix III of the Bern Convention compared to Appendix II, as discussed below).

According to Article 19 of the Habitats Directive, its Annexes can be amended when this is necessary in order to adapt them to “technical and scientific progress.” As regards the procedure to do so, all amendments need to be proposed by the European Commission and decided on by the Council, i.e., the member states. Amendments to Annexes II and V need a qualified majority in the Council to succeed.⁵⁷ Amendments to Annex IV need to be agreed on by the Council unanimously, which is quite a hurdle.⁵⁸ In any event, the Commission must first be in favour of any particular amendment.

⁵⁴Trouwborst, *supra* note 9.

⁵⁵Commission’s answer to parliamentary question E-000135/2013, 14 February 2013; the latter part of the statement relates to the Natura 2000 status of the area (for other species than the wolf).

⁵⁶Milieu Ltd. et al., *Evaluation Study to Support the Fitness Check of the Birds and Habitats Directives* (2016); Arie Trouwborst et al., *Europe’s Biodiversity Avoids Fatal Setback*, 355 SCIENCE 140 (2017).

⁵⁷Habitats Directive, *supra* note 7, art. 19(1).

⁵⁸*Id.* art. 19(2).

Past experiences indicate that it is rather difficult to secure the Commission's support for amendments of the Annexes that lessen the level of protection of a species or population. Spain is a case in point. When the Habitats Directive was drafted, Spanish wolves north of the river Duero were declared subject to Annex V, given the robustness of the northwest Iberian wolf population, and wolves south of this river subject to Annex IV, given the precarious conservation status of the remnant wolf population in the Sierra Morena region in southern Spain.⁵⁹ Subsequently, however, wolves from the expanding northern population have unexpectedly crossed the Duero and established a growing, contiguous population south of the river.⁶⁰ Since then, the Spanish authorities, both national and regional, have sought to amend the Directive's Annexes, so as to subject the north-western wolf population as a whole to Annex V, including the contiguous part of this wolf population to the south of the Duero, while maintaining the Annex IV status of the Sierra Morena population.⁶¹ It is instructive to cite the reasons for the proposed amendments, as formulated by the Spanish delegation to a meeting of the Council of the EU in 2012:

The situation of the wolf population is considerably more precarious at European level than in Spain, which is why the species has been included in Annex IV to the Habitats Directive: animal and plant species of Community interest in need of strict protection.

The management of the wolf population north of the Duero River has proven satisfactory, as demonstrated by the fact that there is a good level of conservation and conflicts with human activities are kept to a minimum.

In view of the expansion of the wolf population north of the Duero River towards the south of the river, Spain has a particular interest in asking the Commission to extend the same legal status under the Habitats Directive to the population south of the Duero River, so that the wolf population south of the Duero River can be managed in the same way as the population north of the river.⁶²

Until today, however, this proposal and similar attempts have not succeeded because of the European Commission's refusal to support these changes.⁶³

⁵⁹See Trouwborst, *supra* note 9.

⁶⁰Juan Carlos Blanco & Yolanda Cortés, *Ecological and Social Constraints of Wolf Recovery in Spain*, in A NEW ERA FOR WOLVES AND PEOPLE: WOLF RECOVERY, HUMAN ATTITUDES, AND POLICY 41 (Marco Musiani, Luigi Boitani, & Paul Paquet eds., 2009).

⁶¹Grupo de Trabajo del Lobo, *Estrategia para la Conservación y la Gestión del Lobo (Canis lupus) en España* (2005).

⁶²Council of the European Union, *Proposal for the Modification of the Status of the Wolf in Directive 92/43/EEC for the Population of Castilla y León, South of the Duero River*, 7369/12 ENV 188 (7 March 2012).

⁶³See, e.g., Rafael Méndez, *Bruselas Frena el Intento de Cañete de Ampliar la Caza del Lobo Ibérico: la EU se Opone a Incluir la Especie como Cinegética También al Sur del Duero*, EL PAÍS (25 March 2012), http://elpais.com/sociedad/2012/03/25/actualidad/1332693965_033377.html; Trouwborst, *supra* note 9.

4.2. Changing the Status of Wolves under the Bern Convention

Under the Bern Convention, Spanish wolves are subject to the flexible Appendix III regime, pursuant to a reservation submitted by Spain when it became a contracting party to the Convention. The Annex V situation in northwestern Spain combines well with the Appendix III status of Spanish wolves under the Bern Convention.⁶⁴ In many countries, however, the Appendix II status of wolves under the Bern Convention implies that even if Annex V status under the Habitats Directive would be acquired, wolf management would still need to take place within the constraints of strict protection as required by Articles 6 and 9 of the Convention—which are very similar to Articles 12 and 16 of the Habitats Directive. Thus in many places more flexibility regarding lethal wolf management can only be achieved by amending the status of wolves under both the Directive and the Convention.⁶⁵

In principle, there are two ways to change a species' status under the Bern Convention: by amending the Appendices and through reservations. Regarding the former, proposed amendments are decided on by the Standing Committee, and their adoption requires a two thirds majority of the parties.⁶⁶ Guidelines regarding such amendments were adopted by the Standing Committee in 1997.⁶⁷ Notably, however, the dozen occasions on which the appendices have been amended virtually all involved the addition of new species, and the only case so far when the protected status of a (sub)species was adjusted to developments in its conservation status was when the Balkan lynx (*Lynx lynx balcanicus*, a critically endangered Eurasian lynx subspecies) was uplisted from Appendix III to II in 2017.⁶⁸ In 2004, Switzerland proposed the downlisting of wolves from Appendix II to Appendix III. The Standing Committee commissioned biological and legal studies to examine the merits of such an amendment, but the proposal eventually failed to secure sufficient support.⁶⁹ In 2018, Switzerland once more proposed the downlisting of the wolf, but the proposal did not come to a vote as many parties were not ready to take a position, although Switzerland

⁶⁴See Trouwborst, *supra* note 9.

⁶⁵It should be noted that the legally anomalous combination of Habitats Directive Annex V and Bern Convention Appendix II does presently already apply in two places, namely Estonia and northern Greece (see Figure 3).

⁶⁶Bern Convention, *supra* note 6, art. 17.

⁶⁷Bern Convention Standing Committee Recommendations No. 56 (1997).

⁶⁸See also Linnell et al., *supra* note 12.

⁶⁹Valeria Salvatori & John DC Linnell, *Report on the Conservation Status and Threats for Wolf (Canis lupus) in Europe*, Bern Convention Doc. T-PVS/Inf(2005) 16 (2005); Clare Shine, *Legal Report on the Possible Need to Amend Appendix II of the Convention for the Wolf*, Bern Convention Doc. T-PVS/Inf(2005) 18 (2005) 18.

stated its wish to revisit the proposal at a future meeting of the Standing Committee.⁷⁰

Regarding the second way to influence a species' status, a reservation only affects the legal status of the species involved *vis-à-vis* the submitting country and can only be filed at the time the country becomes a Convention party.⁷¹ Motivated by a desire for more wolf management flexibility, Switzerland at one point proposed amending Article 22, so as to also enable reservations by countries which are already parties—but again unsuccessfully. Thus the only option for Switzerland and like-minded parties other than repeated attempts to downlist the wolf to Appendix III would be to denounce the Convention and, six months later at the earliest, re-accede to the Convention as a party with a reservation regarding wolves.⁷² Following this route would be highly unusual and would be regarded as somewhat embarrassing intergovernmental behavior by many, but it is legally viable. Scarce (and controversial) precedents include the withdrawal of Trinidad and Tobago from the Optional Protocol to the International Covenant on Civil and Political Rights in 1998, followed by its re-accession with a reservation regarding the death penalty; and the withdrawal of Iceland from the International Whaling Commission in 1992 followed by its readmission with a reservation in 2002.⁷³

In sum, changing the legal status of wolves under the Habitats Directive and the Bern Convention is possible, but difficult to achieve for various reasons, and it would take several years even in the most optimistic scenario.

5. Finding Flexibility Within the Strict Protection Regime

Accordingly, the focus of our analysis will now shift to scouting for flexibility for lethal wolf management within the strict protection regime of Articles 12 and 16 of the Habitats Directive (and Articles 6 and 9 of the Bern Convention).

5.1. The Mandatory Route of Article 16

Where wolves are subject to the Habitats Directive's Annex IV regime, the only way provided in the Directive to make or grant exceptions to Article 12's prohibition to kill them is through derogations under Article 16.

⁷⁰38th Meeting of the Bern Convention Standing Committee, *List of Decisions and Adopted Texts*, Bern Convention Doc. T-PVS(2018)Misc (2018).

⁷¹Bern Convention, *supra* note 6, art. 22.

⁷²*Id.* art. 23.

⁷³Alexander Gillespie, *Iceland's Reservation at the International Whaling Commission*, 14 EUR. J. OF INT'L L. 977 (2003).

Broadly comparable considerations apply to Articles 6 and 9 of the Bern Convention, although the Explanatory Report written by the drafters of the Convention in 1979 indicates the possible existence of certain additional, unwritten exceptions. The Explanatory Report records some of the intentions of the ad hoc Committee that prepared the Convention text. Whereas the report itself notes that it “may facilitate the understanding of the Convention’s provisions,” the report “does not constitute an instrument providing an authoritative interpretation of the text of the Convention.”⁷⁴ Even so, several statements in the report are of interest, in particular regarding killing wolves in self-defence, for humanitarian reasons, or in emergency situations. As the report notes, it was “not thought necessary to specify explicitly” that Article 6’s prohibition to kill would “not apply in case of self-defence.”⁷⁵ Furthermore, regarding the exceptions of Article 9, the report explains:

It was considered that the taking or killing of protected fauna for humane or humanitarian reasons was an accepted practice that did not require a specific provision in the Convention and that there might be emergency cases where exceptions would have to be made without all conditions having been fulfilled (e.g. the abatement of rabies).⁷⁶

Even when assuming this to be a correct interpretation, all killing of Appendix II wolves would need to observe the conditions of Article 9 except in cases involving direct self-defence, humane killing (e.g., of gravely wounded wolves), and “emergency cases.”

Clearly, therefore, it is essential to carefully explore the scope for the killing of wolves under Article 16 of the Habitats Directive—and, in the background, Article 9 of the Bern Convention. Article 16 states as follows (emphases added):

Article 16

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):
 - a. in the interest of protecting wild fauna and flora and conserving natural habitats;
 - 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;
 - d. for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
 - 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.
-

(continued)

⁷⁴Explanatory Report to the Convention on the Conservation of European Wildlife and Natural Habitats, 19 September 1979, C.E.T.S. 104, para. II (1979).

⁷⁵*Id.* para. 31.

⁷⁶*Id.* para. 39.

2. Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.
 3. The reports shall specify:
 - a. the species which are subject to the derogations and the reason for the derogation, including the nature of the risk, with, if appropriate, a reference to alternatives rejected and scientific data used;
 - b. the means, devices or methods authorized for the capture or killing of animal species and the reasons for their use;
 - c. the circumstances of when and where such derogations are granted;
 - d. the authority empowered to declare and check that the required conditions obtain and to decide what means, devices or methods may be used, within what limits and by what agencies, and which persons are to carry out the task;
 - e. the supervisory measures used and the results obtained.
-

The CJEU has already clarified certain aspects of Article 16, including in two cases concerning the hunting of wolves, in both cases in Finland.⁷⁷ The second of these rulings was issued as recently as October 2019, and *inter alia* addressed the controversial question whether legal killing may be allowed to prevent illegal killing (discussed below).⁷⁸ Relevant guidance documents issued by the European Commission include general guidance regarding the Annex IV strict protection regime⁷⁹ and the Carnivore Guidelines.⁸⁰

Regarding Article 9 of the Bern Convention, an important interpretive aid is Revised Resolution No. 2 (1993), adopted by the Standing Committee in 2011 in order to “further clarify the conditions laid down in Article 9 for the granting of exceptions.” The Resolution has an Appendix titled “Interpretation of Articles 8 and 9 of the Bern Convention” (hereinafter “Appendix to Resolution No. 2”). In the Resolution itself, the Standing Committee “recommends that Contracting Parties bring the appended document, which contains useful guidance for interpreting the scope of Article 9, to the attention of all those responsible for applying and interpreting the Convention in their respective countries.” Within the scheme of the Vienna Convention, the guidance provided in the Appendix thus appears to have significant interpretive value in terms of “subsequent agreement.” A helpful background document is the legal analysis prepared by a consultant in connection with the development of Revised Resolution No. 2.⁸¹ In addition, the application of Article 16 of the Habitats Directive

⁷⁷CJEU Case C-342/05, *Commission of the European Communities v. Republic of Finland*, <http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0342&lang1=en&type=TEXT&ancre=> (14 June 2007); Case C-674/17, *Luonnonsuojeluyhdistys Tapiola*, <http://curia.europa.eu/juris/liste.jsf?num=C-674/17> (10 October 2019).

⁷⁸Case C-674/17, *id.* For more context, see Yaffa Epstein & Guillaume Chapron, *The Hunting of Strictly Protected Species: The Tapiola Case and the Limits of Derogation under Article 16 of the Habitats Directive*, 27 EUR. ENERGY AND & ENVTL. L. REV. 78 (2018).

⁷⁹European Commission, *supra* note 51.

⁸⁰Linnell *et al.*, *supra* note 31.

⁸¹Clare Shine, *Interpretation of Article 9 of the Bern Convention*, Bern Convention Doc. T-PVS/Inf(2010)16 (2010).

and Article 9 of the Bern Convention to wolves and other large carnivores has already been the subject of scholarly analysis.⁸² Nevertheless, despite all of the above, various interpretive issues remain unsettled.

5.2. General Features of Article 16

Three important general characteristics of Article 16 are clear at this stage.

First, the three conditions in the Article 16 *chapeau* are cumulative.⁸³ In other words, a derogation for the killing of one or more wolves may be issued only if (1) this is for one of the reasons enumerated under Article 16(1)(a)-(e) and (2) satisfactory alternatives for such killing are absent and (3) the killing is not detrimental to the achievement or maintenance of the wolf population concerned at a favourable conservation status.⁸⁴ The same is true of Article 9 of the Bern Convention.

Second, the CJEU has made it clear that, in view of the Directive's aims, the possibilities for derogation from strict protection provided in Article 16 must be interpreted restrictively rather than liberally.⁸⁵

Third, the Court's case law demonstrates that the burden of proving that the necessary conditions for a given derogation have been met rests with the authority taking the decision.⁸⁶ Likewise, under the Bern Convention the assumption is that "[c]ompetent authorities need to explain the particular circumstances justifying the choice of an Article 9.1 reason and verify that the specific conditions are met."⁸⁷

⁸²Gabriel Michanek, *Strictly Protected European Wolf Meets Swedish Hunter with Licence to Kill*, in PRO NATURA – FESTSKRIFT TIL HANS CHRISTIAN BUGGE 323–345 (Inge L. Backer et al. eds., 2010); Arie Trouwborst, *Managing the Carnivore Comeback: International and EU Species Protection Law and the Return of Lynx, Wolf and Bear to Western Europe*, 22 J. OF ENVTL. LAW 347 (2010); Jan Darpö, *Brussels Advocates Swedish Grey Wolves: On the Encounter Between Species Protection According to Union Law and the Swedish Wolf Policy*, 8 SIEPS EUROPEAN POLICY ANALYSIS 1 (2011); Yaffa Epstein, *Population Based Species Management Across Legal Boundaries: The Bern Convention, Habitats Directive, and the Gray Wolf in Scandinavia*, 25 GEORGETOWN INT'L ENVTL. L. REV. 549 (2013); Trouwborst, *supra* note 55; Jan Darpö & Yaffa Epstein, *Under Fire from All Directions: Swedish Wolf Management Hunting Scrutinized by Brussels and at Home*, in THE HABITATS DIRECTIVE IN ITS EU ENVTL. LAW CONTEXT: EUROPEAN NATURE'S BEST HOPE? 348–372 (Charles-Hubert Born et al. eds., 2015); Jan Darpö & Yaffa Epstein, *Thrown to the Wolves—Sweden Once Again Flouts EU Standards on Species Protection and Access to Justice*, 7 NORDIC ENVTL. L. J. 7 (2015); Jan Darpö, *The Commission—A Sheep in Wolf's Clothing*, 3–4 J. OF EUROPEAN ENVTL. AND & PLANNING L. 270 (2016); Yaffa Epstein, *Killing Wolves to Save Them? Legal Responses to "Social "Tolerance" Hunting" in the European Union and United States*, 26 REVIEW OF EUROPEAN, COMPARATIVE AND INT'L ENVTL. L. 19 (2017); Linnell et al., *supra* note 12; Arie Trouwborst, *Wolves Not Welcome? Zoning for Large Carnivore Conservation and Management under the Bern Convention and EU Habitats Directive*, 27 REVIEW OF EUROPEAN, COMPARATIVE AND INT'L ENVTL. LAW 306 (2018); Epstein & Chapron, *supra* note 78.

⁸³CJEU Case C-508/04, *Commission of the European Communities v. Republic of Austria*, <http://curia.europa.eu/juris/celex.jsf?celex=62004CJ0508&lang1=en&type=TEXT&ancre=> (10 May 2007).

⁸⁴European Commission, *supra* note 51.

⁸⁵E.g., Case C-6/04, *supra* note 48; Case C-508/04, *supra* note 83; Case C-342/05, *supra* note 77; Case C-674/17, *supra* note 77.

⁸⁶CJEU Case C-60/05, *WWF Italia and Others v. Regione Lombardia*, <http://curia.europa.eu/juris/celex.jsf?celex=62005CJ0060&lang1=en&type=TEXT&ancre=> (8 June 2006), para. 34; Case C-674/17, *supra* note 77.

⁸⁷Shine, *supra* note 81.

Overall, it would seem that, generally, Article 16 of the Habitats Directive as interpreted by the CJEU allows for less management flexibility than Article 9 of the Bern Convention as interpreted by the Standing Committee.⁸⁸ This is in conformity with Article 12 of the Bern Convention, which allows contracting parties—including the EU and its member states—to adopt stricter wild-life conservation measures than those required by the Convention.

6. Conservation Status: The More Wolves, the More Flexibility

Article 16's condition regarding the maintenance of a favourable conservation status exercises a significant influence on the possibilities for lethal wolf management. Three dimensions of this condition deserve separate analysis: (1) the level at which the conservation status of wolves should be determined; (2) how to determine whether the conservation status of a particular population is “favourable”; and (3) the possibilities for derogations when a favourable status has not yet been achieved.

6.1. The Reference Level(s) for Determining Conservation Status

The question at what level the conservation status of wolves should be determined has already been the subject of much analysis and debate.⁸⁹ We limit our analysis to considerations of key significance to the issues faced in this article. The principal question here is whether, for the purposes of Article 16, the conservation status of wolves should be considered at the national level of each member state, or (also) at the level of the transboundary population involved.

Overall, the evidence appears to indicate that the national level is the default level, although in certain circumstances the transboundary population level can and should be taken into account.⁹⁰ In the first Finnish wolf case, both parties to the dispute (the European Commission and Finland) assessed the conservation status of wolves at the national level within Finland, without regard to the Russian part of the contiguous Karelian wolf population, and the Court likewise determined that at the time of the dispute “the conservation status of the wolf *in Finland* was not favourable” (emphasis added).⁹¹ The Court took a similar approach in the aforementioned French

⁸⁸Linnell *et al.*, *supra* note 12.

⁸⁹Trouwborst, *supra* note 51; Epstein, *supra* note 82; Trouwborst, *supra* note 31; Epstein *et al.*, *supra* note 26; Epstein, *supra* note 26; Trouwborst *et al.*, *supra* note 26; Trouwborst *et al.*, *supra* note 17; Hendrik Schoukens, *Saving the Common Hamster from Extinction with the EU Habitats Directive: A Mandatory Recovery Effort, a Remediation of Past Non-Compliance or an Exercise in Futility?*, 1 NORDIC ENVTL. L. J. 59 (2017), <https://biblio.ugent.be/publication/8522888/file/8522891.pdf>.

⁹⁰*Id.*

⁹¹Case C-342/05, *supra* note 83, para. 27.

hamster case, addressing the hamster's conservation status within France without considering the contiguous population across the border in Germany and further eastward.⁹² Likewise, the European Commission, acting in its capacity as EU law enforcer in its currently still pending infringement procedure against Sweden over its wolf policy, has focused on the conservation status of wolves within Sweden. In one of its letters the Commission notes that "Sweden and the Commission agree that *the Swedish population is not in favourable conservation status*," while failing to refer to the transboundary Scandinavian population, which also includes animals in Norway (emphasis added).⁹³ The Commission took a similar, national approach in various infringement proceedings over hamster conservation against France, the Netherlands, Germany, and Belgium.⁹⁴

There are indications, however, that for wolves and other large carnivores, the transboundary population might be an appropriate level for determining conservation status, in particular when a full-fledged population-level management plan for the population involved is in effect.⁹⁵ The first Finnish wolf judgment was issued by the CJEU prior to the publication of the Carnivore Guidelines in 2008. Since then, as noted above, the leading paradigm with regard to wolves and other large carnivores has become the transboundary population-level approach. Already in a 2007 guidance document on strict protection, the European Commission expressly advocated the view that in connection with Article 16 derogations, "the killing of individuals of a wide-ranging large carnivore will need to be evaluated *at population level (transboundary where applicable)*" (emphasis added).⁹⁶ The Carnivore Guidelines similarly indicate the (transboundary) population as the most appropriate scale on which to focus conservation status assessments.⁹⁷ However, for transboundary populations, this is conditional on the adoption and implementation of a joint management plan or equivalent formalized cooperative structure, between the competent authorities of all countries concerned, for every large carnivore population. Thus all countries sharing the population should "contribute to ensuring between them that the population reaches and maintains [favourable conservation status]."⁹⁸ According to the Carnivore Guidelines, each

⁹²Case C-383/09, *supra* note 47; see also Marc Clément, *Global Objectives and the Scope of the Habitats Directive: What Does the Obligation of Result Mean in Practice? The European Hamster in Alsace*, in Born *et al.*, *supra* note 82; Schoukens, *supra* note 89.

⁹³Letter of European Commissioner Janez Potocnik to Swedish Environment Minister Carlgren Regarding Sweden's Wolf Policy, Ref.A res. (2010).

⁹⁴Schoukens, *supra* note 89.

⁹⁵Trouwborst *et al.*, *supra* note 17.

⁹⁶European Commission, *supra* note 51.

⁹⁷Linnell *et al.*, *supra* note 31.

⁹⁸*Id.*

transboundary management plan should clarify what is taken as the “favourable reference population” and “favourable reference range” for the population involved and identify the actions to be taken by each participating country to achieve or maintain those values.⁹⁹ Regarding removals of animals from the population, including through Article 16 derogations, the plan should set a “population level limit for the number of individuals that can be removed per year,” while ensuring that any actual removal is coordinated between all countries involved, and that the evaluation of Article 16’s conservation status criterion is performed at the level of the transboundary population.¹⁰⁰ This way, each individual member state would have more flexibility to authorize derogations where deemed desirable than it would have had when applying a national approach.¹⁰¹

Some further clarity regarding the appropriate level(s) for determining the conservation status of wolves in connection with Article 16 has recently emerged from the second Finnish wolf case, in which the referring national court specifically asked the CJEU to indicate whether, in the context of Article 16, the conservation status of a species ought to be assessed at regional, national, and/or an international level.¹⁰² According to the Court, conservation status and the impact of prospective derogations thereon must be assessed in principle (1) on the scale of the territory of the member state involved; (2) in member states straddling more than one biogeographical region, the scale of the biogeographical region involved within that member state; or (3) “if the natural range of the species so requires and, to the extent possible, at a cross-border level.”¹⁰³ Regarding the latter, the ruling expressly states that this does not apply with regard to population segments in third countries that are not bound by strict protection obligations.¹⁰⁴ *In casu*, this is a clear reference to the Russian Federation, but similar considerations could apply to other non-EU member states such as Norway, Switzerland, and North Macedonia. However, the Court still left obscure to what degree, and under what conditions precisely, member states may take into account population segments in neighbouring EU member states. Clearly, the ruling cannot be interpreted to mean that a member state can lawfully limit its own population to a handful of wolves based on the mere argument that there is a flourishing population across the border.¹⁰⁵

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹Trouwborst, *supra* note 51; Trouwborst *et al.*, *supra* note 17.

¹⁰²Case C-674/17, *supra* note 77.

¹⁰³*Id.*, para. 58.

¹⁰⁴*Id.*, para. 60.

¹⁰⁵See also Trouwborst *et al.*, *supra* note 26.

Another crucial clarification in the second Finnish wolf ruling concerns the role of the local population. In this regard, the Court asserts that it is generally necessary to assess a derogation's impact also at the level of the local population, *inter alia* in light of the cumulative effect that multiple derogations can have on the conservation status at national or transboundary levels.¹⁰⁶

6.2. The Criteria for Determining Conservation Status

Regardless the level at which it is done, how to determine whether the conservation status of a particular population is favourable is another issue which is not yet fully settled.¹⁰⁷

According to Article 1(i) of the Habitats Directive, the conservation status of a species is favourable when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.

When it comes to operationalizing these criteria for specific species and populations, much remains unclear. For instance, member states' conceptions concerning what, generally speaking, constitutes a "favourable reference population" vary widely, and include thresholds of 5,000 individuals in a functionally connected population (Flanders); 500 reproductive units (the Netherlands); 500 functionally connected mature individuals at the biogeographical region level (Denmark); and several much hazier approaches, used by the majority of member states.¹⁰⁸

For wolves, the Carnivore Guidelines provide a uniform methodology to assess the conservation status of each distinct population. The general criteria from Article 1(i) of the Habitats Directive have been elaborated into an operational definition of favourable conservation status for large carnivores.¹⁰⁹ This approach is partly based on the system employed by the

¹⁰⁶Case C-674/17, *supra* note 77, para. 59.

¹⁰⁷European Commission, *supra* note 51; Linnell *et al.*, *supra* note 31; Douglas Evans & Marita Arvela, *Assessment and Reporting under Article 17 of the Habitats Directive: Explanatory Notes & Guidelines for the Period 2007–2012* (European Commission 2011); Trouwborst, *supra* note 51; Epstein *et al.*, *supra* note 26; Epstein, *supra* note 26; Trouwborst *et al.* *supra* note 17; Schoukens, *supra* note 89.

¹⁰⁸Andrew McConville & Graham Tucker, *Review of Favourable Conservation Status and Birds Directive Article 2 Interpretation within the European Union* (Institute for European Environmental Policy, 2015), available at <http://publications.naturalengland.org.uk/publication/4852573913743360>; Trouwborst *et al.*, *supra* note 17.

¹⁰⁹Linnell *et al.*, *supra* note 31.

IUCN for drawing up the Red List of Threatened Species.¹¹⁰ According to the Carnivore Guidelines, this would imply that a wolf population needs to contain at the very least 250 mature individuals for the conservation status of a population to be considered favourable, in addition to the fulfilment of further criteria, including a sufficient connectivity with neighbouring populations.¹¹¹ Importantly, the Guidelines stress the need to factor in not only demographic viability but genetic viability as well, which could entail setting favourable reference populations at “significantly higher levels than the minimum levels predicted by a [population viability analysis].”¹¹²

The way in which the favourable conservation status concept has been operationalized in the Carnivore Guidelines has been criticized by some for being too minimalist and for paying insufficient attention to genetic factors,¹¹³ although in our view this criticism is largely unjustified.¹¹⁴ In any event, there is presently no absolute certainty that the Carnivore Guidelines’ approach would be endorsed by the CJEU as reflecting a correct interpretation of the Habitats Directive, as the Court has hitherto not provided very detailed guidance in this regard. In the French hamster case, as in the first Finnish wolf case, the CJEU failed to dwell on the implementation of the favourable conservation status concept in uniform terms, although it did include the specific statement that “there were no populations [of hamsters] which reached its minimum viable population threshold, which is estimated at 1500 individuals spread over an area of contiguous suitable land of 600 hectares.”¹¹⁵ In the second Finnish wolf case, the Court provided another piece of the puzzle by stating that a favourable conservation status implies the safeguarding, in the long term, of the dynamics and social stability of the populations involved.¹¹⁶ It also held that the application of the favourable conservation status condition of Article 16 requires assessing, first, the present conservation status of the populations involved and, second, the geographical and demographic impacts of the envisaged derogation(s) on this status.¹¹⁷ Uncertainty and discussion (also) remain regarding the role of ecological factors in the assessment of conservation status.¹¹⁸

¹¹⁰*Id.*

¹¹¹*Id.*

¹¹²*Id.*

¹¹³See also Epstein *et al.*, *supra* note 26.

¹¹⁴Trouwborst *et al.*, *supra* note 17.

¹¹⁵Case C-383/09, *supra* note 47; see also Schoukens, *supra* note 89.

¹¹⁶Case C-674/17, *supra* note 77, para. 57.

¹¹⁷*Id.*, para. 58.

¹¹⁸Epstein *et al.*, *supra* note 26; Trouwborst *et al.*, *supra* note 17.

Significantly, when doubt remains as to whether an envisaged derogation will adversely affect the maintenance or restoration of a population at a favourable conservation status, this derogation is impermissible. This is a consequence of the application of the precautionary principle.¹¹⁹ The second Finnish wolf ruling expressly confirms that, in light of this principle, member state authorities must refrain from issuing a derogation in cases when, after scrutiny of the best available scientific information, uncertainty remains regarding the impact of the derogation on conservation status.¹²⁰

6.3. Derogations When Conservation Status Is Not Favourable

This leads to the next question raised by the formulation of Article 16—that is, whether any legal room for killing Annex IV wolves exists in situations where their conservation status is not (yet) favourable, as is presently the case in a number of member states that are in the process of wolf recolonization.¹²¹

This question was addressed by the CJEU in its first Finnish wolf judgment. The Court held that derogations affecting populations whose conservation status is unfavourable may be permissible “by way of exception” in cases “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.”¹²² The CJEU expressly endorsed the interpretation from a Commission guidance document that the elimination of one or a few animals can be neutral in the sense that the prospect of a favourable status is not impaired.¹²³ As that guidance document puts it: “The net result of a derogation should be neutral or positive for a species.”¹²⁴ This interpretation was reaffirmed in the second Finnish wolf ruling, which also emphasized the exceptional nature of such derogations when conservation status is unfavourable, and indicated that also here the precautionary principle must be applied in case of doubt regarding the derogations’ effects.¹²⁵

According to the same guidance document, the above flexible approach is possible only when the ultimate achievement and maintenance of a favourable conservation status is warranted through a “clear and well-developed framework of species conservation measures” consisting of “appropriate, effective and verifiable” measures.¹²⁶ Species protection plans are accorded a

¹¹⁹Treaty on the Functioning of the European Union, 25 March 1957, art. 191(2).

¹²⁰Case C-674/17, *supra* note 77, para. 66.

¹²¹Trouwborst, *supra* note 82.

¹²²Case C-342/05, *supra* note 77, para. 29.

¹²³*Id.*; European Commission, *supra* note 51.

¹²⁴European Commission, *id.*

¹²⁵Case C-674/17, *supra* note 77, paras. 68–69.

¹²⁶*Id.*

significant role in this connection. Such plans may, in the Commission's view, be essential to demonstrate the compatibility of derogations with the Directive.¹²⁷ The more robust the plan—that is, the more likely it will ensure a favourable conservation status—the more space for the granting of derogations. Similarly, the Carnivore Guidelines state that at unfavourable conservation status, limited exemptions from the strict protection of large carnivores can be acceptable, but “the arguments must be very strong, and the action very limited.”¹²⁸ That is the case when there is a “detailed conservation/management plan” capable of guaranteeing that a derogation, in combination with others, does not adversely affect conservation status.¹²⁹ This is an important argument for developing population-level management plans. Indeed, “having a population level management plan is virtually essential to ensure that the sum of all derogations given does not have a detrimental effect.”¹³⁰

Notably, the conservation status criterion from Article 16 does not stand in the way of the removal of rabid wolves, fatally injured ones, or wolf-dog hybrids,¹³¹ as their elimination does not adversely impact conservation status.¹³²

6.4. The More Wolves, the More Management Flexibility

As is evident from the above analysis, the scope for lethal wolf management is proportional to the conservation status of the population. In the words of the European Commission, “the less favourable the conservation status and trends, the less likely will the granting of derogations be justified apart from in the most exceptional circumstances.”¹³³ Conversely, the more wolves there are, the less likely it is that the conservation status criterion from Article 16 will pose an obstacle to an otherwise justifiable derogation. In brief, the more wolves, the more management flexibility.¹³⁴ Incidentally, the latter statement is true for the Bern Convention, too.¹³⁵

It also seems that the conservation status of a wolf population is a factor influencing the probability of the European Commission initiating an

¹²⁷*Id.*

¹²⁸Linnell *et al.*, *supra* note 31.

¹²⁹*Id.*

¹³⁰*Id.*

¹³¹Arie Trouwborst, *Exploring the Legal Status of Wolf-Dog Hybrids and Other Dubious Animals: International and EU law and the Wildlife Conservation Problem of Hybridization with Domestic and Alien Species*, 23 REV. OF EUROPEAN, COMPARATIVE AND INT'L ENVTL. L. 111 (2014), <https://doi.org/10.1111/reel.12052>.

¹³²Trouwborst, *supra* note 82.

¹³³European Commission, *supra* note 51.

¹³⁴Trouwborst *et al.*, *supra* note 17.

¹³⁵*Id.*; Linnell *et al.*, *supra* note 12.

infringement procedure against a member state over wolf management measures based on Article 16. It appears more likely that the Commission will instigate proceedings over the application of Article 16 against a member state with a small, fragile wolf population than against a member state hosting a robust population in a favourable conservation status—for instance Romania—even if in the latter instance there have been serious questions regarding the compatibility of derogations with Article 16 (see below). The infringement proceedings the Commission has instigated against Finland and Sweden both involved relatively small, vulnerable wolf populations in an unfavourable conservation status, and the same is true of an infringement procedure initiated against France in 2006 over the shooting of various wolves.¹³⁶ As another example, the Commission has at various stages made specific inquiries into the wolf hunting policy of Slovenia, also involving a relatively small wolf population subject to Annex IV.¹³⁷

7. Article 16(1)(b)

There are differences in the extent to which, the ways in which, and the conditions under which wolves are killed in the various EU member states.¹³⁸ In various member states, such killing needs to conform only to the requirements associated with Annex V status. In those cases where wolves were killed in parts of the EU where Annex IV status applies, member states have predominantly based such killing on Article 16(1)(b) and/or Article 16(1)(e).¹³⁹

7.1. Preventing Serious Damage

When the condition regarding favourable conservation status is met and satisfactory alternatives are absent (see [Section 7.2](#) below), Article 16(1)(b) allows the killing of one or more wolves in order to prevent “serious damage” to livestock and other types of property, such as (hunting) dogs.

The word “serious” indicates that a certain degree of damage is required for this derogation ground to be applicable, and that derogations may not be allowed to prevent threats of “minor damage.”¹⁴⁰ As the European Commission clarified, Article 16(1)(b) does not cover “mere nuisance” or

¹³⁶Valeria Salvatori & John D.C. Linnell, *LARGE CARNIVORE CONSERVATION AND MANAGEMENT IN EUROPE: LESSONS LEARNT FROM THE LEGAL CASES AND ENQUIRIES DEALT BY THE DG ENV.* (European Commission 2012).

¹³⁷*Id.*; LUPUS, *supra* note 12.

¹³⁸See, e.g., Kaczensky *et al.*, *supra* note 8; LUPUS, *supra* note 12.

¹³⁹*Id.*; also Epstein & Chapron, *supra* note 78.

¹⁴⁰CJEU Case C-247/85, *Commission of the European Communities v Kingdom of Belgium*, <http://curia.europa.eu/juris/celex.jsf?celex=61985CJ0247&lang1=en&type=TEXT&ancre=> (8 July 1987).

“normal business risk.”¹⁴¹ According to the interpretive guidance on Article 9 of the Bern Convention, “serious” does not necessarily mean widespread: “in some cases the item or property affected may cover only a limited geographical area (for example, a region), or even a particular farm or group of farms.”¹⁴²

As a guidance document by the European Commission points out, according to the text of Article 16 authorities do not need to wait for serious damage to occur—a derogation may in principle be issued when serious damage is likely.¹⁴³ In the first Finnish wolf case, the CJEU determined in this regard that a derogation for such preventive killing can be issued only when research has actually “established that the hunting is such as to prevent serious damage.”¹⁴⁴ Specifically, the Court held that by allowing hunting without identifying the damage-causing wolf or wolves, and killing one or more members of a wolf pack without having established that this would prevent serious damage, Finland had violated its obligations under the Directive.¹⁴⁵ When the available evidence is subject to uncertainty, the authorities must decide in favour of the strict protection of the species involved, in conformity with the precautionary principle. This can be illustrated with reference to the CJEU’s handling, in the same case, of conflicting scientific reports concerning the effects of wolf hunting in terms of livestock depredation prevention:

Although it cannot be automatically ruled out that authorising the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis. In that regard, as stated in [the Finnish] management plan, certain parties are of the opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available. In those circumstances, the Commission’s complaint [that Finland has wrongly authorized wolf hunting on the basis of Article 16(1)(b)] must be upheld.¹⁴⁶

The required specificity, to provide another example, appears to have been missing in the derogations issued during the past decade by the Romanian authorities for the killing of wolves, bears, and lynx—all three of which are Annex IV species in Romania. This involved the granting of one all-encompassing derogation for each species a year, authorizing the killing of a

¹⁴¹European Commission, *supra* note 51.

¹⁴²Bern Convention Appendix to Resolution No. 2 (2011).

¹⁴³European Commission, *supra* note 51.

¹⁴⁴Case C-342/05, *supra* note 77.

¹⁴⁵*Id.*

¹⁴⁶*Id.*, para. 42–44.

considerable number of animals by hunters throughout the country, on the basis of Article 16(1)(b) combined with 16(1)(a) (“in the interest of the protection of wild fauna and flora”) and 16(1)(c) (“public safety”).¹⁴⁷ For example, in 2008 three derogations were issued to authorize the killing of 169 wolves, 276 bears, and 28 lynx.¹⁴⁸ The 2011 wolf derogation allowed the killing of 498 wolves, 189 of which were actually hunted, and similar quotas were set in subsequent years, with gradually increasing numbers of wolves actually reported killed (520 and 221 in 2012; 495 and 255 in 2013; 520 and 272 in 2014; 598 and 332 in 2015). These annual Article 16 derogations enabled the continuation of the practice of population management through quota hunting that had existed before Romania became an EU member state. Clearly, however, the compatibility of such broad derogations with Article 16 is questionable. In addition, questions have been raised regarding the reliability of population monitoring in Romania and concomitant inflated official censuses of large carnivore numbers in the country.¹⁴⁹

Bern Convention guidance specifies in connection with Article 9 that “it is sufficient if serious damage in all likelihood will occur” (Appendix to Resolution No. 2). According to this guidance, the derogations made should be proportional to the damage suffered: “the fact that an isolated farm sustains damage would not appear to justify the capture or killing of a species over a very wide area, unless there is evidence that the damage could extend to other areas.”¹⁵⁰

7.2. The Absence of Satisfactory Alternatives

Allowing the killing of wolves to avoid serious economic losses from depredation under Article 16(1)(b) is possible only after the authorities have conclusively verified that satisfactory alternatives are absent. It is the task of the competent authorities to make the necessary comparisons and evaluate alternative solutions.¹⁵¹ The assessment whether any satisfactory alternatives exist should be context-dependent and involve a comparison of the measure reviewed, in this case the killing of one or more wolves, with alternative measures. This requires the identification of potential alternatives to

¹⁴⁷The N2K Group, *Composite European Commission Report on Derogations in 2007–2008 According to Article 16 of Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora (the Habitats Directive)* (European Commission 2011); see also Ludwig Krämer, *Implementation and Enforcement of the Habitats Directive*, in Born *et al.*, *supra* note 82.

¹⁴⁸The N2K Group, *id.*

¹⁴⁹Viorel Popescu *et al.*, *Assessing Biological Realism of Wildlife Population Estimates in Data-Poor Systems*, 53(4) J. OF APPLIED ECOLOGY 1248 (2016).

¹⁵⁰Bern Convention Appendix to Resolution No. 2 (2011).

¹⁵¹European Commission, *supra* note 51.

such killing and addressing the question whether these alternatives could indeed achieve the prevention of the serious damage feared.¹⁵²

As an overall guideline, the European Commission has rightly stressed in this regard that the Directive allows recourse to Article 16 only as a “last resort.”¹⁵³ The Commission has furthermore produced the following guidance on the application of the satisfactory alternatives condition:

The appraisal of whether an alternative is satisfactory or not, in a given situation, must be founded on objectively verifiable factors, such as scientific and technical considerations. In addition, the solution finally selected, even if it involves a derogation, must be objectively limited to the extent necessary to resolve the specific problem or situation.

Evidently, the requirement to consider seriously other alternatives is of primary importance. The discretionary power of Member States is limited, and where another solution exists, any arguments that it is not “satisfactory” will need to be convincing. Moreover, it should be stressed that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behavior by the beneficiaries of the derogation.¹⁵⁴

The onerous nature of the alternatives criterion has been confirmed in both Finnish wolf cases. In the first one, the CJEU explained that it is for the member state authorities wishing to grant a derogation to furnish a “clear and sufficient statement of reasons as to the absence of a satisfactory alternative.”¹⁵⁵ In the second ruling, the Court added that the authorities must do so with reference to “the best relevant scientific and technical evidence and in the light of the circumstances of the specific situation in question.”¹⁵⁶

Comparable considerations apply regarding the application of the alternatives criterion under Article 9 of the Bern Convention, which similarly stipulates that derogations from strict protection may be authorized only when “there is no other satisfactory solution.”¹⁵⁷ In this regard, the Appendix to Resolution No. 2 clarifies that the competent authorities should “choose, among possible alternatives, the most appropriate one that will have the least adverse effects on the species while solving the problem,” and furthermore adds that the reasoning justifying the choice made should be “objective and verifiable.”

There is considerable experience across Europe when it concerns protecting domestic livestock from large carnivore depredation without killing the

¹⁵²*Id.*

¹⁵³*Id.*; see also Hendrik Schoukens & Kees Bastmeijer, *Species Protection in the European Union: How Strict Is Strict?*, in Born et al., *supra* note 82.

¹⁵⁴European Commission, *supra* note 51.

¹⁵⁵Case C-342/05, *supra* note 77, para. 31.

¹⁵⁶Case C-674/17, *supra* note 77, para. 51.

¹⁵⁷Linnell et al., *supra* note 12.

predators.¹⁵⁸ A range of non-lethal measures exist that can greatly reduce losses, including electric fencing and intensive shepherding, both of which can also involve livestock guarding dogs.¹⁵⁹ As the Carnivore Guidelines phrase it: “Many tried and trusted methods exist that have a well documented ability to reduce depredation on livestock to very low levels.”¹⁶⁰

However, the introduction of these measures can be very expensive and can be associated with logistical challenges, especially when required on a large scale.¹⁶¹ The question then arises to what extent it is expected that stakeholders adapt large-scale animal husbandry practices to accommodate wolves, or how quickly this transition should occur.¹⁶² In particular, the question arises to what extent the high costs of an otherwise effective alternative measure can disqualify it as a “satisfactory” alternative in terms of Article 16. This issue has not been conclusively settled yet by the CJEU and in that sense remains, as the Carnivore Guidelines put it, an “open question.”¹⁶³

In any event, as long as the conservation status of the wolves in question is unfavourable, the possibilities to kill wolves in order to “prevent serious damage” under Article 16 need to remain limited to exceptional cases.

8. Article 16(1)(e)

8.1. Quotas within the Framework of the Habitats Directive

Quotas can be viewed in different senses within the framework of the Habitats Directive’s species protection obligations.

First, Annex V lists species “whose taking in the wild and exploitation may be subject to management measures” (Habitats Directive, Annex V). The Directive expressly offers the “establishment of a system of licences for taking specimens or of quotas” amongst the possible measures that member states may take to secure the maintenance of the species involved at a favourable conservation status (Article 14(2)). Thus where Annex V applies to wolves, a system of quotas may be established as an exception to the liberal possibilities offered by the Directive for hunting or otherwise killing wolves with Annex V status.

Second, in the areas where Annex IV applies, the term “quota” may be used in connection with the favourable conservation status criterion, to

¹⁵⁸Urs Breitenmoser *et al.*, *Non-Lethal Techniques for Reducing Depredation*, in PEOPLE AND WILDLIFE: CONFLICT OR COEXISTENCE? (Rosie Woodroffe *et al.* eds., 2005); Linnell *et al.*, *supra* note 31.

¹⁵⁹*Id.*; Linnell *et al.*, *supra* note 12.

¹⁶⁰Linnell *et al.*, *supra* note 31, at 30.

¹⁶¹*Id.*

¹⁶²Linnell *et al.*, *supra* note 12.

¹⁶³Linnell *et al.*, *supra* note 31, at 30.

indicate the maximum number of wolves that could in principle be killed within a member state or population without prejudicing the achievement or maintenance of a favourable population status, although this is not the most common understanding of the term.¹⁶⁴ An example is the French wolf plan for 2018–2023, determining that no more than 10–12 percent of the national wolf population may be killed each year, so as not to threaten the population’s viability.¹⁶⁵ The CJEU determined in the second Finnish wolf case that management plans and nationally determined maximum amounts of animals that may be killed in a particular season can form relevant factors for the application of the conservation status criterion.¹⁶⁶

Third, various member states allow or have allowed the hunting of particular annually determined amounts of wolves and other large carnivores to which Annex IV applies, on the basis of Article 16. These include Croatia, Estonia, Finland, Latvia, Romania, Slovenia, and Sweden.¹⁶⁷ Here, contrary to the Annex V situation sketched above, the establishment of quotas is an exception to the strict protection of wolves under Annex IV. The legal basis invoked for such quota hunting is mostly Article 16(1)(b), 16(1)(e), or a combination thereof, although, as illustrated above with reference to Romania, Article 16(1)(a) and (c) have also been relied on as a basis for quota hunting. Given the various strict criteria discussed previously, in many instances the compatibility of such quota hunting with Article 16 is open to question. After all, in the words of Epstein, “the language of the Habitats Directive as well as the Court’s jurisprudence indicate that the possibilities for national authorities to allow hunting of species that are listed in Annex IV are quite narrow.”¹⁶⁸ As mentioned earlier, however, the European Commission in its enforcement capacity has generally been passively tolerant of said practices, except in cases where the population’s conservation status is unfavourable.

In the remainder of the current section, quotas are discussed primarily in the third aforementioned sense, and specifically in connection with Article 16(1)(e). The latter provision offers the option “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.” This could be interpreted as providing

¹⁶⁴*Id.*; Kaczensky *et al.*, *supra* note 8; LUPUS, *supra* note 12.

¹⁶⁵Ministère de la Transition Écologique et Solidaire & Ministère de l’Agriculture et de l’Alimentation, *Plan National d’Actions 2018–2023 sur le Loup et les Activités d’Élevage* (2018).

¹⁶⁶Case C-674/17, *supra* note 77, para. 62.

¹⁶⁷Kaczensky *et al.*, *supra* note 8; LUPUS, *supra* note 12; Linnell *et al.*, *supra* note 31; The N2K Group, *supra* note 147.

¹⁶⁸Epstein, *supra* note 82.

a basis, under certain conditions, for quota hunting of wolves even where Annex IV applies. This interpretation is now explored in more detail.

8.2. Article 16(1)(e) as a Basis for Wolf Quota Hunting

Article 16(1)(e), unlike grounds (a)–(d), does not mention a reason or purpose for which the “taking” of a limited number of specimens would be allowed. Nonetheless, it follows from the broader text of Article 16(1) that member state authorities wishing to base a derogation on Article 16(1)(e) must indicate the purpose(s) for which the taking is allowed. This follows in particular from the alternatives test, which is mandatory for all derogations.

As the European Commission states in one of its guidance documents, the absence of a satisfactory alternative is an “overarching condition that *all* derogations must satisfy,” thus including those based on Article 16(1)(e).¹⁶⁹ As the same guidance document adds, the analysis of whether a satisfactory alternative exists “presumes that a specific problem or situation exists and needs to be tackled.”¹⁷⁰ To resolve this problem or situation, the authorities involved must then identify all possible ways in which the problem or situation could be resolved and choose the one that will encroach the least on the strict protection of the species as required under Article 12 (see also Section 7.2 above). The case law of the CJEU clearly reveals, in the words of the Commission, “the importance of demonstrating that there are compelling reasons to justify a derogation.”¹⁷¹ In sum, member states invoking Article 16(1)(e) are to demonstrate that no satisfactory alternative exists for the taking of the targeted animals. They cannot do so without first providing the reason(s) for this taking.¹⁷² In the words of a Slovenian court faced with this issue recently, to assume no such reason needs to be provided would be “completely absurd” in light of the alternatives criterion, and render the latter “meaningless.”¹⁷³

The above reading of Article 16 was already confirmed in the case law of the CJEU concerning the Birds Directive.¹⁷⁴ The derogation provision in Article 9 of the Birds Directive, which is the equivalent of Article 16 of the Habitats Directive, permits member states to derogate from strict protection “where there is no other satisfactory solution, for the following

¹⁶⁹European Commission, *supra* note 51, para. 34 (emphasis added).

¹⁷⁰*Id.* para. 37.

¹⁷¹*Id.*, para. 42; see, e.g., CJEU Case C-344/03 of 15 December 2005, *Commission of the European Communities v Republic of Finland*; Case C-342/05, *supra* note 77.

¹⁷²See also Darpö & Epstein, *supra* note 82; Epstein & Chapron, *supra* note 78, at 80.

¹⁷³Administrative Court of the Republic of Slovenia, ECLI:SI:UPRS:2018:I.U.168.2017.18, para. 24, 1 March 2018, [http://www.sodisce.si/ursr/odlocitve/2015081111418010/\(unofficialtranslation\)](http://www.sodisce.si/ursr/odlocitve/2015081111418010/(unofficialtranslation)).

¹⁷⁴Directive 2009/147/EC on the Conservation of Wild Birds, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32009L0147>.

reasons: ... (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.” In various judgments, the Court has confirmed that the condition of “no other satisfactory solution” also applies to this Article 9(1)(c).¹⁷⁵ In the second Finnish wolf ruling, the Court expressly endorsed a similar reading of Article 16(1)(e) of the Habitats Directive, according to which member state authorities must explicitly indicate the purpose(s) for which they consider issuing a derogation on the basis of this provision.¹⁷⁶

Bern Convention guidance similarly confirms with regard to the Convention’s Article 9 that the condition of no satisfactory alternative applies also to derogations “to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers,” as provided in the last indent of Article 9(1).¹⁷⁷ In order to enable this, the contracting party involved must ensure that the reason why it permits such exploitation is “clearly identified.”¹⁷⁸

Having established that member state authorities invoking Article 16(1)(e) of the Habitats Directive must identify concrete reasons for doing so, the logical next question is whether the choice of reasons is subject to any limitations. Different interpretations are possible in this regard.

According to a liberal reading of Article 16(1)(e), the text of which does not mention any specific purpose(s), the killing of a limited number of wolves could in principle be permitted for any reason. This interpretation of Article 16(1)(e) as a “catch-all’ justification”¹⁷⁹ has been expressly endorsed by the parties to the Bern Convention regarding the similar clause in Article 9 of the Convention. The interpretive guidance adopted by the Standing Committee in 2011 states that derogations on the basis of this clause “may be decided by a Contracting Party for any reason which to it seems valid (for instance, hunting, recreation, etc.).”¹⁸⁰

Consideration of Article 16(1) as a whole, however, can also render a more restrictive interpretation. Grounds (a)–(e) are apparently presented in this provision as alternative purposes that are complementary rather than overlapping. Within this scheme, ground (e) can be understood as a residual

¹⁷⁵Case C-247/85, *supra* note 140; CJEU Case C-135/05 of 26 April 2007, *Commission of the European Communities v. Italian Republic*; see also *Bowman et al.*, *supra* note 17.

¹⁷⁶Case C-674/17, *supra* note 77.

¹⁷⁷Bern Convention Appendix to Resolution No. 2 (2011).

¹⁷⁸*Id.*; see also *Bowman et al.*, *supra* note 17.

¹⁷⁹Epstein & Chapron, *supra* note 78, at 79.

¹⁸⁰Bern Convention Appendix to Resolution No. 2 (2011), at 4.

category, to be relied on for purposes not mentioned under (a)–(d). According to Darpö and Epstein, Article 16(1)(e) is a “typical ‘last resort’ derogation possibility after everything else has been made use of,” the application of which is “intended to be quite exceptional.”¹⁸¹ Likewise, Article 16(1)(e) may apparently not be relied on to circumvent the conditions stipulated in the other grounds. For instance, as discussed above, under Article 16(1)(b) the killing of wolves can only be allowed to prevent “serious” damage, not minor damage.¹⁸² To suppose that wolves could still conveniently be killed for the prevention of minor damage on the basis of Article 16(1)(e) appears incongruous. In the same vein, it would seem that Article 16(1)(e) cannot be used to justify derogations for public interests that fall short of qualifying as “imperative reasons of overriding public interest,” which latter are covered under (c).¹⁸³ If this reading is correct, Article 16(1)(e) could only be used to allow derogations serving private interests other than damage prevention.

Until the second Finnish wolf ruling, the case law of the CJEU shed little light on the scope of Article 16(1)(e) of the Habitats Directive.¹⁸⁴ The CJEU’s case law regarding the Birds Directive, however, already contained significant clues regarding the likely outcome. In judgments concerning the aforementioned equivalent clause in Article 9(c) of the Birds Directive, the Court has accepted, as valid purposes for derogations pursuant to Article 9(c), the “hunting of wild birds for recreational purposes”; the “capture and sale of wild birds ... with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets”; and the “capture of protected species with a view to obviating, in bird breeding for recreational purposes, the problems of consanguinity which would result from too many endogenous crossings.”¹⁸⁵ Strikingly, all these instances concern recreational purposes. This case law thus aligns with—but does not conclusively affirm—the aforementioned interpretation that Article 16(1)(e) can be used only for derogations serving private interests other than damage prevention. It is also notable that the aforementioned Bern Convention guidance, even though it characterizes the Convention’s equivalent clause as a catch-all provision, precisely mentions “hunting, recreation, etc.” as examples.¹⁸⁶

¹⁸¹Darpö & Epstein, *supra* note 82.

¹⁸²See Section 7.1.

¹⁸³*Id.*

¹⁸⁴See Epstein & Chapron, *supra* note 78.

¹⁸⁵CJEU Case C-262/85, *Commission of the European Communities v. Italian Republic*, CJEU C-262/85, <http://curia.europa.eu/juris/celex.jsf?celex=61985CJ0262&lang1=en&type=TEXT&ancre=> (8 July 1987); CJEU Case C-10/96, *Ligue Royale Belge pour la Protection des Oiseaux ASBL and Société d’Études Ornithologiques AVES ASBL v. Région Wallonne*, <http://curia.europa.eu/juris/celex.jsf?celex=61996CJ0010&lang1=en&type=TEXT&ancre=> (12 Dec. 1996); CJEU Case C-182/02, *Ligue pour la Protection des Oiseaux and Others v. Premier Ministre and Ministre de l’Aménagement du Territoire et de l’Environnement*, <http://curia.europa.eu/juris/celex.jsf?celex=62002CJ0182&lang1=en&type=TEXT&ancre=> (16 October 2003); CJEU Case C-60/05, *supra* note 86.

¹⁸⁶See text accompanying *supra* note 180.

Regarding the quota hunting of wolves and other large carnivores, the Carnivore Guidelines submit that Article 16(1)(e) “could be used to justify a carefully regulated harvest of some animals.”¹⁸⁷ The European Commission’s guidance document on strict protection also expressly takes the view that carefully regulated quota hunting of large carnivores with a favourable conservation status can be based on Article 16(1)(e).¹⁸⁸ As an example, it highlights the quota hunting of lynx, based on a management plan, in Latvia:

The plan forms the basis for a long-term strategy for the conservation and management of the lynx in Latvia, including strictly limited harvesting of the population by hunting. It takes a long-term view, where the lynx in Latvia currently has its best distribution status within the last 150 years and is considered to have a favourable conservation status. Limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception. The practice thus fully complies with Article 16(1)(e) of the Habitats Directive.¹⁸⁹

This interpretation is contested. For instance, some commentators assume it is the result of the European Commission trying to find an “innovative solution” to the inflexibility of the Annex IV regime and the difficulty of transferring species to Annex V.¹⁹⁰ In their view, this solution has insufficient connection with the wording of Article 16 and the purpose of the Directive, and it is incompatible with the stringent interpretation of Article 16 flowing from the case law of the CJEU.¹⁹¹ These commentators conclude that “the purpose of Article 16(1)(e) is not to allow management hunting.”¹⁹²

The recent Finnish wolf ruling has again provided increased clarity regarding this question. The Court affirmed the restrictive interpretation by expressly stating that the purpose of a derogation based on Article 16(1)(e) may in principle not overlap with the purposes mentioned under Article 16(1)(a)–(d), and that ground (e) “can only serve as a basis for ... a derogation in cases where [grounds (a)–(d)] are not relevant.”¹⁹³ Article 16(1)(e) is a last resort, not a catch-all clause. Whether in this particular case the Court then took this general rule to its logical conclusion might be questioned. The stated purpose of the Finnish authorities to allow the legal hunting of a number of wolves was to reduce the illegal hunting of wolves, in order to achieve a favourable conservation status for the population (on the legal merits of such “tolerance hunting”; see below). According to the Court, this is a purpose that can, in principle, justify derogations on the

¹⁸⁷Linnell *et al.*, *supra* note 31, at 30.

¹⁸⁸European Commission, *supra* note 51, at 57.

¹⁸⁹*Id.*

¹⁹⁰Darpö, *supra* note 82; Darpö & Epstein, *Under Fire ...*, *supra* note 82; Epstein & Chapron, *supra* note 78.

¹⁹¹*Id.*

¹⁹²Darpö & Epstein, *Under Fire ...*, *supra* note 82.

¹⁹³Case C-674/17, *supra* note 77, para. 37.

basis of Article 16(1)(e).¹⁹⁴ Thus the Court seems to imply that such hunting to improve wolves' conservation status is not "in the interest of protecting wild fauna" in the sense of ground (a), nor an "imperative reason of overriding public interest" in the sense of ground (c).

At any rate, in light of the above, we proceed to the following section of this article on the assumption that Article 16(1)(e) can in principle provide a valid basis for limited, strictly regulated wolf quota hunting once several conditions are met.

8.3. The Conditions to Be Met

Article 16(1)(e) cannot be invoked as a basis for wolf quota hunting unless the two overarching conditions that apply to all derogations are fulfilled, as well as a string of conditions specific to ground (e).

First, the generic requirement regarding conservation status applies. Hence, regardless of whether all other conditions are fulfilled, as long as the conservation status of wolves is not favourable, the possibilities to kill wolves under Article 16(1)(e) will remain restricted to exceptional cases (see [Section 6.3](#) above).

Second, also in scenarios where conservation status is favourable, there is the condition that satisfactory alternatives must be absent. The extent to which this condition poses an obstacle will depend on the purpose for which the authorities wish to authorize wolf quota hunting. The hunting of wolves is often allowed for one or more of the following (partly overlapping) reasons: reducing damage to livestock; reducing competition with human hunters for game (prey) species; adding recreational and/or economic value; maintaining wolves' shyness; empowering rural communities; increasing acceptance of the species' presence; and reducing illegal killing.¹⁹⁵ As discussed above, for many of these reasons it is highly doubtful whether they can serve as a purpose for invoking Article 16(1)(e) at all. That question aside, in each case it would need to be convincingly demonstrated by the competent authorities that (1) killing wolves is a suitable means for achieving the purpose involved in the first place,¹⁹⁶ and that (2) it is the only satisfactory way to achieve it. The burden of proof lies firmly with the member state in this regard (see [Section 6.2](#) above). Based on "objectively verifiable factors, such as scientific and technical considerations,"¹⁹⁷ the authorities must provide a "clear and sufficient statement of

¹⁹⁴*Id.* paras. 39–43.

¹⁹⁵Linnell *et al.*, *supra* note 12, at 133.

¹⁹⁶This requirement was stressed by the CJEU in both Finnish wolf cases, Case C-342/05, *supra* note 77, and Case C-674/17, *supra* note 77.

¹⁹⁷European Commission, *supra* note 51, at 59.

reasons as to the absence of a satisfactory alternative.”¹⁹⁸ When faced with uncertainty in the available information, the authorities must decide in favour of the wolf’s strict protection, in line with the precautionary principle.

One particularly pertinent question concerns the scope for lethal wolf management aimed at maintaining or promoting society’s acceptance of wolves. It will be recalled that the European Commission’s guidance document cited earlier explicitly assumes that “[l]imited and strictly controlled taking by hunters” can have a “positive impact on the population as well as on public perception.”¹⁹⁹ Evidently, however, killing wolves—also dubbed “tolerance hunting”²⁰⁰—is not the only way to promote acceptance.²⁰¹ To illustrate, the European Commission itself made this point in a letter to the Swedish Environment Minister regarding a wolf hunt that had been authorized by the Swedish authorities on the basis of Article 16(1)(e) with the purpose of increasing acceptance of the wolf’s presence by the human population:

the Commission considers that there are a number of other means of reaching public acceptance than license hunting of a strictly protected species, such as investments in awareness raising and technical assistance and support to specific stakeholders (e.g. livestock breeders). The local and regional communities can be further involved in the management of the species, through strengthened communication, better compensation schemes and preventive measures. ... In addition, (potentially) damage-causing wolves can be eliminated on the basis of the derogation possibility in Article 16.1 b).²⁰²

Furthermore, there is scientific uncertainty as to whether and to what extent hunting actually increases acceptance. The argument that allowing wolf hunting tends to benefit the species by gaining social acceptance is contested amongst experts, and so is the related argument that allowing legal killing tends to reduce illegal killing.²⁰³ Regarding the latter, it will be recalled that member states are under an obligation of result to prevent any illegal killing of Annex IV animals (see [Section 3.2](#) above); the question here would be whether allowing legal hunting can in particular circumstances be shown to be the only way to meet this obligation.²⁰⁴ Whereas the Swedish Supreme Administrative Court has accepted hunting as a legally viable option under Article 16 to increase social tolerance of wolves,²⁰⁵

¹⁹⁸Case C-342/05, *supra* note 83, at 30.

¹⁹⁹European Commission, *supra* note 51, at 57.

²⁰⁰Epstein, *supra* note 82.

²⁰¹Darpö & Epstein, *Under Fire ...*, *supra* note 82.

²⁰²Potocnik, *supra* note 93, at 5.

²⁰³See, e.g., Erik R. Olson *et al.*, *Pendulum Swings in Wolf Management Led to Conflict, Illegal Kills, and a Legislated Wolf Hunt*, 8(5) CONSERVATION LETTERS 351 (2014); Guillaume Chapron & Adrian Treves, *Blood Does Not Buy Goodwill: Allowing Culling Increases Poaching of a Large Carnivore*, 283 PROCEEDINGS OF THE ROYAL SOCIETY B 1830 (2016); Epstein, *supra* note 82; Linnell *et al.*, *supra* note 12.

²⁰⁴Along these lines, see also Case C-674/17, *supra* note 77, paras. 48–52.

²⁰⁵Swedish Supreme Admin. Court, 30 December 2016, Cases 2406-2408-16 and 2628-2630-16 (Swe.).

Epstein has pointed out that in the absence of clear evidence that allowing hunting delivers wolf conservation results, the CJEU is likely to “interpret the Habitats Directive to prohibit tolerance hunting.”²⁰⁶ In the second Finnish wolf ruling, the Court, in fact, conceded that tolerance hunting could in principle be based on Article 16(1)(e).²⁰⁷ In light of the same ruling, however, it presently does seem difficult to meet the required standard of proof regarding the suitability and effectiveness of tolerance hunting to achieve its stated aims, and the absence of satisfactory alternatives to the killing of wolves insofar as acceptance—and, by extension, wolf conservation—is the purpose of aspired wolf quota hunting on the basis of Article 16(1)(e). Additionally, one may rightly wonder to what extent the certain killing of strictly protected animals to prevent the speculative killing of animals from the same species is in line with the precautionary principle.²⁰⁸ Incidentally, it can also be argued that tolerance hunting of wolves could in principle be based on Article 16(1)(a), although the evidence proving such hunting to be firmly in the wolf’s own interest would need to be at least as strong.

Regarding the weight of the evidentiary burden, it is interesting to revisit the Latvian lynx quota hunting example (see [Section 8.2](#) above). Despite the European Commission’s statement that “limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception,”²⁰⁹ Latvia’s 2002 lynx management plan did not, in fact, provide conclusive evidence to show that hunting indeed did have such positive impacts.²¹⁰ Evidently, increased “tolerance” of a species is ultimately relevant for its conservation status only insofar as it translates into concrete population effects. As Epstein and Chapron put it, “legal hunting must reduce poaching by a greater number of individuals than are killed by legal hunting.”²¹¹ Overall, the Latvian lynx plan would likely have been “insufficient to show why hunting is the best and indeed a viable alternative to achieve the aim of conserving the lynx population under the standards announced by the Court of Justice.”²¹² The second Finnish wolf ruling appears to confirm this conclusion, with the Court clearly suggesting

²⁰⁶Epstein, *supra* note 82; see also Epstein & Chapron, *supra* note 78.

²⁰⁷Case C-674/17, *supra* note 77.

²⁰⁸Epstein & Chapron, *supra* note 78, at 84.

²⁰⁹See the text accompanying *supra* note 189; European Commission, *supra* note 51, at 57.

²¹⁰Jānis Ozoliņš, *Management Plan for Eurasian Lynx (Lynx lynx) in Latvia* (2002), http://www.catsg.org/fileadmin/filesharing/3.Conservation_Center/3.4._Strategies___Action_Plans/Eurasian_lynx/Ozolins_2002_Management_plan_for_the_Eurasian_lynx_in_Latvia.pdf. This point was made by Epstein & Chapron, *supra* note 78, at 82.

²¹¹Epstein & Chapron, *id.*, at 84.

²¹²*Id.* at 82.

that the Finnish wolf hunting derogations and the underlying management plan failed to pass the test of Article 16.²¹³

The question arises whether member state authorities could avoid some of the difficulties posed by the alternatives criterion by defining the purpose of quota hunting under Article 16(1)(e) in such a manner that alternatives simply do not exist. Generally, this is likely to be difficult without giving the impression of acting in bad faith. An example would be to allow wolf quota hunting for the specific purpose of “fulfilling the demand of rural stakeholders for wolf quota hunting” or something along those lines. The only way to achieve this particular purpose would be to authorize wolf quota hunting, so that the condition that satisfactory alternatives must be absent is automatically met. Interestingly, this issue has arisen in another recent case before the CJEU, concerning Maltese legislation allowing the capture of finches in alleged contravention of the Birds Directive.²¹⁴ Whereas unfortunately the Court had no need to address this issue to decide the case, the Advocate-General did consider it in her advice to the Court. Specifically, the Advocate-General is of the view that member state authorities must identify a “legitimate aim” when invoking Article 9(c) of the Birds Directive, and she does “not think that a Member State may define the problem that it seeks to address artificially so as to exclude other potential satisfactory solutions.”²¹⁵

Third, supposing the conditions concerning conservation status and alternatives can be met, any wolf quota hunting under Article 16(1)(e) must be carried out “under strictly supervised conditions.” According to the European Commission, this implies the use of clear authorizations that can be related to “particular individuals or groups of individuals, places, times and quantities.”²¹⁶ The interpretive guidance regarding the Bern Convention records that the identical words “under strictly supervised conditions” in Article 9 of the Convention should be interpreted to mean that the authorities granting the derogation must possess the “necessary means for checking on such exceptions either beforehand (e.g., a system of individual authorisations) or afterwards (e.g., effective on-the-spot supervision), or also combining the two possibilities.”²¹⁷ Moreover, the aforementioned finch judgment by the CJEU makes clear that the bar for meeting the “strictly supervised conditions” criterion is set high indeed. Whereas Malta claimed it had implemented a supervision regime “of a

²¹³Case C-674/17, *supra* note 77.

²¹⁴CJEU Case C-557/15, *Commission of the European Communities v. Republic of Malta*, <http://curia.europa.eu/juris/celex.jsf?celex=62015CJ0557&lang1=en&type=TEXT&ancre=> (21 June 2018).

²¹⁵Opinion of A.G. Sharpston of 26 July 2017, Case C-557/15, *supra* note 214, para. 68.

²¹⁶European Commission, 2007, *supra* note 51, at 57.

²¹⁷Appendix to Resolution No. 2 (2011).

rigour unprecedented within the EU,” the Court nevertheless found it wanting.²¹⁸

Fourth, any wolf quota hunting based on Article 16(1)(e) must be conducted “on a selective basis”; consequently, in the words of the guidance document on strict protection, it must be “highly specific in its effect.”²¹⁹ Depending on the circumstances, this could require, as the Commission suggested in the course of the aforementioned Swedish wolf infringement proceedings, that the hunt targets “certain packs or groups of packs in areas where the wolf presence is particularly controversial.”²²⁰

Fifth, the words “to a limited extent” reinforce the above restrictive interpretation, so that any hunting would be “limited in both space and time.”²²¹ According to the European Commission, this also implies the need for efficient enforcement to ensure compliance with the various conditions by the hunters involved.²²² This is in conformity with CJEU case law.²²³

Sixth, and finally, any wolf quota hunting must be restricted to “limited numbers.” The CJEU, the European Commission, and the Bern Convention’s Standing Committee agree that this is not an absolute criterion, and that the determination of what are “limited numbers”—or, in the words of the Bern Convention and Birds Directive, “small numbers”—should rather be determined in relation to the status of the population concerned as a whole.²²⁴ For birds, the words “small numbers” in Article 9(c) of the Birds Directive have been interpreted by the CJEU as meaning no

²¹⁸Case C-557/15, *supra* note 215, paras. 90–97 (“The Republic of Malta contends that it has enacted an enforcement and supervision regime of a rigour unprecedented within the EU. The use of the system making real time bag reporting mandatory by telephone made it possible to collect and check in real time any individual licence holder’s catches as well as the uptake of individual bag limits, and to monitor the uptake of national quotas. An obligation was imposed on all licence holders to fit specially marked, single-use rings on every bird captured, immediately upon making a catch. The use of the rings is rigorously enforced during spot checks in the field. At the end of the season, unused rings must be returned to the authorities. The Republic of Malta states, finally, that, during the period of the derogation, the Maltese authorities routinely deployed a daily complement of over 50 officers in order to oversee compliance with the legal parameters. All the registered live capturing stations were inspected at some point during the derogation and 23% of all the individual licence holders were subject to a thorough spot check inspection. ... In the context of Malta, characterized by a very high density of licence holders, namely over 4000, and of registered trapping stations, namely over 6400, the fact that merely 23% of hunters have been subject to individual checks seems inadequate. Furthermore, it is apparent from Birdlife Malta’s study ... that failure to observe the restrictions relating to authorized catch periods and locations, in particular by trapping inside ‘Natura 2000’ sites, has been rather frequent. ... It follows from the foregoing that the Republic of Malta has failed to adduce evidence that the derogation at issue is used under strictly controlled conditions, within the meaning of Article 9(1)(c) of Directive 2009/147”).

²¹⁹European Commission, *supra* note 51, at 57.

²²⁰Potocnik, *supra* note 93, at 6; *see also* Epstein & Chapron, *supra* note 78, at 82.

²²¹Bern Convention Appendix to Resolution No. 2, at 5.

²²²European Commission, *supra* note 51, at 57.

²²³*See, e.g.*, Case C-103/00, *supra* note 44; and Section 3.2 above.

²²⁴CJEU Case C-252/85, *Commission of the European Communities v. French Republic*, <http://curia.europa.eu/juris/celex.jsf?celex=61985CJ0252&lang1=en&type=TEXT&ancre=> (27 April 1988); European Commission, *supra* note 51; Appendix to Resolution No. 2; *see also* Linnell, *supra* note 12.

more than 1 percent of the total annual mortality rate of the population involved.²²⁵ This criterion of 1 percent of mortality has also been highlighted by the European Commission concerning Article 16(1)(e) of the Habitats Directive, both in general and regarding Swedish wolves in particular.²²⁶ In the latter context, the Commission has held that “[k]illing up to 15% of the population of a strictly protected species in a license hunt cannot fulfill the requirements” of Article 16(1)(e), particularly since the statistics indicated that “the wolf mortality due to the license hunt is by far the major cause of mortality for wolves in Sweden” during the period concerned.²²⁷

Also, in the second Finnish wolf case, the Court’s ruling leaves little doubt that the derogations under scrutiny fell short of meeting various of the specific conditions enumerated in Article 16(1)(e).²²⁸

9. Concluding Observations

Clearly, the EU Habitats Directive and the Bern Convention impose significant restrictions on the discretion of public authorities regarding the killing of wolves, especially in the large parts of Europe where wolves are strictly protected species under Annex IV of the Directive and/or Appendix II of the Convention. There, in principle, the killing of wolves is to be prohibited and effectively prevented.

Where wolves are subject to the Habitats Directive’s Annex IV regime, the only way provided in the Directive to make exceptions to the killing prohibition is through derogations under Article 16. A derogation for the killing of one or more wolves may be issued only if (1) such killing is suitable to achieve a purpose fitting the phrasing of Article 16(1)(a)–(e) *and* (2) satisfactory alternatives for such killing are absent *and* (3) the killing is not detrimental to the achievement or maintenance of the wolf population concerned at a favourable conservation status. These conditions are to be interpreted restrictively.

Regarding the third condition, it appears that the conservation status of wolves must in principle be assessed at the local and the national level. However, once a full-fledged population-level management plan has been developed for a transboundary population by the countries

²²⁵Case C-344/03, *supra* note 171, paras. 5354.

²²⁶European Commission, *supra* note 51; Potocnik, *supra* note 93.

²²⁷Potocnik, *id.*, at 6; see also Hendrik Schoukens, *De Terugkeer van de Wolf naar België: Juridische Spelregels voor een Emotioneel Geladen Debat (Deel 1)*, 2 TIJDSCHRIFT VOOR OMGEVINGSRECHT EN OMGEVINGSBELEID 79 (2012); Yaffa Epstein & Jan Darpö, *The Wild Has No Words: Environmental NGOs Empowered to Speak for Protected Species as Swedish Courts Apply EU and International Environmental Law*, 10 J. FOR EUROPEAN ENVTL. AND PLANNING L. 250 (2013); Darpö & Epstein, *supra* note 82.

²²⁸Case C-674/17, *supra* note 77.

involved, then the transboundary population would appear to become an appropriate benchmark for Article 16 assessments. This would create more management flexibility. Until a favourable conservation status is achieved, the room for derogations is limited to exceptional cases in which it has been established that the derogation involved will not impair the prospect of a favourable status. Generally, the more wolves there are, the more flexibility arises for the killing of wolves when deemed desirable. It would also seem that the better the conservation status of a wolf population becomes, the less likely it becomes that the European Commission will take enforcement action against the member state involved regarding wolf killing that is allegedly incompatible with Article 16.

Once the condition regarding favourable conservation status is met and satisfactory alternatives are absent, Article 16(1)(b) allows the targeted killing of one or more wolves to prevent serious damage to livestock or other property. The condition of no satisfactory alternatives plays a particularly important role in this context.

Article 16(1)(e) can be interpreted as allowing strictly regulated quota hunting of wolves once a range of conditions is met. The case law of the CJEU makes clear, however, that it is difficult for member state authorities to meet these conditions in practice, especially with regard to wolf populations in an unfavourable conservation status. Similar considerations apply regarding the possibility to authorize the killing of wolves in order to promote acceptance of the species—legally viable in principle, but hard to reconcile with the Habitats Directive's requirements in practice.

Certain variables are tightly related with the options of member states to allow the killing of wolves under the Habitats Directive, namely (1) the conservation status of the populations in question; (2) the quality of the scientific evidence showing that the various conditions of Article 16(1) are met; (3) the quality of supervision and regulatory safeguards in member states' hunting regimes and wolf plans; and (4) the extent and quality of intergovernmental cooperation targeting transboundary wolf populations. As these variables improve, so does the scope for legally viable wolf hunting.

Acknowledgments

Helpful comments and/or information provided by Luigi Boitani, Eladio Fernández-Galiano, Miha Krofel, and John Linnell are gratefully acknowledged.

Funding

This work was funded by the Netherlands Organization for Scientific Research (NWO), as part of the project *Ius Carnivoris* (project no. 452-13-014).