

The Hunting of Strictly Protected Species

The Hunting of Strictly Protected Species: The *Tapiola* Case and the Limits of Derogation under Article 16 of the Habitats Directive

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Abstract

Whether or under what circumstances the hunting of species listed as strictly protected in the Habitats Directive's Annex IV can be allowed has been the subject of extensive controversy and litigation in several Member States. Finland has asked the Court of Justice for a preliminary ruling on several questions, the answers to which will have wide-reaching consequences for how species are protected in the EU. This article addresses these questions, in particular the permissibility of the management hunting of strictly protected species, the permissibility of allowing hunting with the goal of preventing poaching, and at what scale the "favourable conservation status" of species populations should be considered. It argues that exploitive hunting of strictly protected species is not consistent with the purpose of the Habitats Directive, that hunting for the purpose of preventing poaching cannot be considered a conservation measure under the Habitats Directive, and that species' conservation status should be considered unfavourable for the purposes of derogation if it is unfavourable at the local population level, the Member State level, or the EU level. It concludes by discussing the consequences of this analysis for hunting in the EU more broadly.

I. Introduction

The Habitats Directive requires the Member States to take measures to restore or maintain the favourable conservation status of species and habitats. These measures must include the prohibition of killing members of species that have been deemed in need of strict protection and listed in its Annex IV.¹ This prohibition is not absolute; the Directive's Article 16 enumerates the conditions under which derogation from its species protection provisions can be permitted. When these exceptions can be applied has frequently been controversial. In particular, when or whether hunting may be allowed has generated extensive political debate, with many hunting, farming and other agricultural organizations advocating in

favour and conservation organizations advocating against it.² In response to political pressure, some Member States have allowed or continued to allow hunting despite legal uncertainty, which has resulted in extensive litigation. For example the quota hunting of wolves in Sweden has been the target of an infringement proceeding from the European Commission that has been ongoing since 2011, as well as numerous legal challenges in the Swedish courts.³ In 2016, the Swedish Supreme Administrative Court ruled that Swedish quota hunting complied with EU law, despite the European Commission's ongoing criticism.⁴

The killing of wolves in Finland has also ignited frequent litigation and controversy at both the national and EU level. In 2007, the Court of Justice ruled that Finland's practice of granting of permits to kill wolves for the purpose of preventing damage, without showing that damage was likely to be prevented, violated the Habitats Directive.⁵ Despite the enactment of strict protective measures, the wolf population started declining after 2007, when the population was estimated at 270–300, and reached a low of 120–135 in 2013. The population began to recover in 2014, however, poaching was blamed for the prior decline, and the only cure was argued to be legal

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¹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7/1992, pp. 0007–0050 at Article 12 and Annex IV.

² J. Darpö, "The Commission: A Sheep in Wolf's Clothing? On Infringement Proceedings as a Legal Device for the Enforcement of EU Law on the Environment, Using Swedish Wolf Management as an Example" *Journal for European Environmental & Planning Law*, 2016 Vol. 13, p. 270, 272–273; J. Hiedanpää, "Institutional Misfits: Law and Habits in Finnish Wolf Policy", *Ecology & Society*, 2013 Vol. 18, Issue 1, p. 24.

³ J. Darpö and Y. Epstein, "Under Fire from All Directions: Swedish Wolf Management Scrutinized by Brussels and at Home" in C. Born *et al.*, eds, *The Habitats Directive in its EU Environmental Law Context: European Nature's Best Hope?* (Routledge 2015) p. 348.

⁴ Y. Epstein, "Killing Wolves to Save Them? Legal Responses to 'Tolerance Hunting' in the European Union and United States", *Review of European, Comparative & International Environmental Law*, 2017 Vol. 26, Issue 1, p. 19, 26–27; Swedish Supreme Administrative Court, Cases 2406-2408-16 & 2628-2630-16 (2016).

⁵ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341).

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hunting.⁶ The Hunting Act was amended to allow the so-called management hunting of wolves, and a two year hunting trial was implemented.⁷ Under this system, the Ministry of Agriculture and Forestry issued a yearly decree setting the total number of wolves that could be killed through management hunting permits, as well as any other restrictions on which animals may be killed.⁸ Decisions to grant specific derogations were made by the Finnish Wildlife Agency. Individuals wishing to hunt sent an application to the agency for a derogation permit, in which they had to state the number of wolves to be hunted, the proposed dates of the hunt, and the region in which hunting would take place. Further, to nominally indicate compliance with the requirements articulated in the 2007 court decision, the application had to include information such as the number of individual animals in the targeted wolf pack, the behavior of the targeted wolves, and any other reasons for seeking permission to kill the wolf. The decree for 2015 set the ceiling for hunting at 29. 24 permits were granted and 17 wolves were killed. The next winter, 2015/2016, the decree was set at 46; 46 permits were granted, and 44 wolves were killed.⁹ Many of the permits were appealed to the national courts, and an appeal concerning two permits to hunt a total of seven wolves eventually reached the Finnish Supreme Administrative Court.¹⁰ That court requested a preliminary ruling on several questions concerning Article 16 of the Habitats Directive and the hunting of strictly protected species.¹¹

In this article, we examine several important unclaritys in Article 16 that are at issue in that case, including whether quota hunting can be used to manage populations of strictly protected species, whether hunting can be allowed for the purpose of preventing poaching, and how to measure whether the conservation status of populations is favourable. The answers are expected to have a broad impact on the protection of species in the EU.

II. Hunting for Population Management

The Finnish court's first question was whether regionally restricted derogation permits based on applications from individual hunters can be granted for "population management purposes" under Article 16(1)(e) of the Habitats Directive. According to Article 16(1) of the Habitats Directive, derogation from species protection can be allowed only if there is no satisfactory alternative, derogation would not be detrimental to the maintenance of the populations of the species at favourable conservation status, and derogation is justified by one of five enumerated reasons:

- (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.

The last of these is a "catch-all" justification, which does not state a specific purpose but rather imposes an additional set of conditions when the taking or killing of strictly protected species is allowed for reasons other than those enumerated in the first four clauses. It is under this Article 16(1)(e) that Finland's contested hunt was permitted. Finland has since stopped using this derogation ground to allow hunting, instead using 16(1)(c), the public interest. However, several other Member States, including Sweden, Slovenia and Latvia, currently allow regionally restricted "management hunting" using 16(1)(e), so the Court's answer may determine whether or under what conditions these hunts can continue.

There are two aspects to the question of whether Article 16(1)(e) can be used to allow regionally restricted hunting. The first is whether management can be a permissible purpose for allowing regionally restricted hunting, and the second is whether this type of hunting can meet the formal requirements of Article 16(1)(e). These aspects are considered in turn below.

2.1 Hunting for management purposes

As already noted, several Member States allow regionally restricted hunting for the purpose of managing species populations. However, managing

⁶ Ministry of Agriculture and Forestry, *Management Plan for Wolves in Finland (Förvaltningsplan för vargstammen i Finland)* (2015), p. 7.

⁷ Ministry of Agriculture and Forestry, "Press Release: Evaluation of Wolf Hunting for Population Management – Hunting Continues with Some Changes" 2016, available at http://mmm.fi/en/article/-/asset_publisher/evaluation-of-wolf-hunting-for-population-management-hunting-continues-with-some-changes (last accessed 3 May 2018).

⁸ Hunting Act 41(5) (2013).

⁹ 43 wolves were killed by hunters; a 44th was wounded and later killed by police.

¹⁰ KHO:2017:182.

¹¹ Case C-674/17 Request for a preliminary ruling from the Korkein hallinto-oikeus (Finland) lodged on 1 December 2017 – Luonnonsuojeluyhdistys Tapiola Pohjois-Savo – Kainuu ry.

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strictly protected species in this manner would seem to violate the purpose as well as the text of the Directive. As a preliminary matter, Article 16(1) allows derogation from the system of strict protection required by Article 12 when all specified conditions and criteria are met.¹² Because Article 16 “is a provision constituting an exception to the system of strict protection which the Directive imposes,” its requirements must be interpreted restrictively.¹³ The authorities granting the derogation have the burden of proving all conditions are met.¹⁴ In addition to strictly meeting the requirements laid out in Article 16(1), derogation must be “justified in relation to the overall aim of the Directive.”¹⁵ Derogation may not be allowed if it would be contrary to the Habitats Directive’s “spirit and purpose,” or undermine the coherent system of protection set out by its provisions.¹⁶

The species listed in Annex IV of the Habitats Directive are designated “in need of strict protection” and may not be hunted according to Article 12. Annex V, on the other hand, lists “animal and plant species of community interest whose taking in the wild and exploitation may be subject to management measures.” The exploitation of these species is permissible subject to certain limitations and if the use of these species is compatible with their being maintained at favourable conservation status.¹⁷ Allowing the exploitation of Annex IV species would treat them as Annex V species and may therefore impermissibly undermine the coherence of the Habitats Directive.

Article 16(1) allows for derogation from species protection for particular purposes if the preconditions that there exist no satisfactory alternative and that derogation is not detrimental to the favourable conservation status of species populations are met. Article 16(1)(e), as noted, does not express a specific purpose, but rather allows derogation from strict protection if several additional conditions are also met. The precondition that no satisfactory alternative exist indicates that derogation must nevertheless have a purpose, and that the purpose must be consistent with the overall aim of the Habitats Directive.

This interpretation is supported by the case-law of the Court of Justice. In the 2007 *Finnish wolf* case (C-342/05),¹⁸ the Court found that Finland failed to meet the requirements for allowing the killing of wolves. In that case, killing was justified under derogation ground (b), the prevention of serious damage, here predation on livestock. The Court criticized Finland for failing to state the reasons that there were no satisfactory alternatives for preventing damage other than killing wolves (i.e., the implementation of non-lethal interventions to reduce the number of livestock heads killed by wolves). As a lack of satisfactory alternatives is a requirement for derogation under all of the derogation grounds in Article 16, it may be extrapolated that a statement of reasons as to why there are no satisfactory alternatives is required for any of the derogation grounds. It therefore follows

that a well-supported justification for derogation using ground (e) must be provided; otherwise it would not be possible to state why no satisfactory alternative exists.

Rulings pertaining to the Birds Directive¹⁹ are often relevant by analogy to the interpretation of the Habitats Directive. The need for a statement of reasons in Habitats Directive cases is also supported by the Court’s rulings in Birds Directive cases, which required a statement of reasons indicating why there were no other satisfactory solutions for derogations made under the Birds Directive’s corresponding provision, Article 9(1)(c).²⁰

Not only must a justification be provided, that justification must be legitimate and not at odds with the Directive’s purpose. The Court of Justice has rejected justifications given in several cases relating to the Birds Directive for allowing hunting or other taking of birds under Article 9(1)(c) as incompatible with that Directive’s purpose. For example, the Court has ruled that the taking of birds for captive breeding, because otherwise breeders would have to change their practices, was not a sufficiently good reason to derogate.²¹ As summarized in Commission guidance, it is necessary that Member States demonstrate “compelling reasons” that derogation is justified.²²

But while hunting can be permitted under the Birds Directive Article 9(1)(c) if there are compelling reasons to do so, there are both textual and purpose-based reasons why this determination should not apply to the Habitats Directive. First, the Birds Directive

¹² See Judgment of 10 May 2007, *Commission v Austria* (C-504/04, EU:C:2007:274, para. 110).

¹³ Judgment of 10 May 2007, *Commission v Austria* (C-504/04, EU:C:2007:274, para. 110 and the case-law cited).

¹⁴ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, para. 25).

¹⁵ The European Commission so argues in the *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p. 50.

¹⁶ Judgment of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, paras 112, 113).

¹⁷ Article 14.

¹⁸ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341).

¹⁹ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, OJ L 20, 26.1.2010, pp. 7–25.

²⁰ E.g., Judgment of the Court of 7 March 1996, *Associazione Italiana per il World Wildlife Fund and others v Regione Veneto* (C-118/94, EU:C:1996:86, para. 21).

²¹ Judgment of 12 December 1996, *Ligue royale belge pour la protection des oiseaux ASBL and Société d’études ornithologiques AVES ASBL v Région Wallonne* (C-10/96, EU:C:1996:504, paras 6–22).

²² European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds “The Birds Directive”* (2008), p. 49.

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explicitly permits derogation to allow the “judicious use” of species while the Habitats Directive does not. Second, the Birds Directive Article 9(1)(c) has a different purpose than the Habitats Directive Article 16(1)(e). The Birds Directive’s provision applies to derogations relating to any of the EU’s wild birds, including those that may be hunted, while the Habitats Directive’s only applies to Annex IV species, which may not be hunted at all under ordinary circumstances. As the Habitats Directive 16(1)(e) applies only to strictly protected species, it should be interpreted more restrictively than the corresponding provision in the Birds Directive. Article 9(1)(c) of the Birds Directive clearly allows hunting for the purpose of using species in limited circumstances. Article 16(1)(e) of the Habitats Directive, which echoes Article 9(1)(c) in some ways, does not. This indicates an intention on the part of the legislator to omit exploitive hunting from the type of derogation that can be made under Article 16(1)(e).²³ Derogation allowing the killing of members of strictly protected species that has the character of exploitive hunting or a hunting season should therefore be precluded under Article 16(1)(e). *A fortiori*, the hunting of members of strictly protected species that has the character of exploitive hunting or a hunting season when that species does not have favourable conservation status should be precluded.

In the *Tapiola* case, the regionally restricted hunt had the character of exploitive hunting or a hunting season. A maximum number of permits that could be granted and the time period in which they could be granted were decided in advance by the Ministry of Agriculture and Forestry. While it was stated that the number of permits that could be granted was a ceiling not a quota, in fact all of the 46 allowable permits were granted in the hunting year contested in this case. Permits were granted to kill wolves in a particular region rather than particular wolves. While hunters were advised to avoid killing the alpha wolves and to target cubs or wolves that had caused damage, they were allowed to kill any wolf within the prescribed region or territory. In fact, 20 wolves out of the 44 that were killed in the hunting season were members of the alpha pair. Further, a stated goal of the wolf management plan is “enhancing the status of the wolf as a valuable natural resource,” that is, enhancing its value as a game animal.²⁴ To this end, hunters were allowed to keep the hunted animals as quarry. The presence of these factors indicates that the regional hunt in question was more like an exploitive game hunt rather than conservation management measures. This type of regionally restricted hunting therefore should not be permissible under Article 16(1)(e) of the Habitats Directive.

Regionally restricted hunting, if allowed at all, should not be allowed for management purposes. Measures to manage species populations are permitted and sometimes required by the Habitats Directive if

necessary for the maintenance of biodiversity. These measures must be truly and competently aimed at achieving and maintaining the favourable conservation status of species.²⁵ That is, population management of a strictly protected species can only be allowed if it has the aim of maintaining or restoring the favourable conservation status of species. Otherwise, it is in direct contravention of Article 2 of the Habitats Directive, which states that “[m]easures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species.”

Regionally restricted hunting does not serve the purpose of promoting the conservation management of species. This type of hunting reduces the number of individual animals in a particular region. Reducing the number of individual members of strictly protected species does not promote their maintenance at favourable conservation status, and *a fortiori* does not promote achieving favourable conservation status for strictly protected species that have unfavourable conservation status.²⁶

Since regionally restricted hunting is not a good solution for managing a strictly protected population, it is unlikely that more satisfactory alternatives for managing the population cannot be found. Claims that hunting a strictly protected species is the most satisfactory solution for the conservation management of a population must be closely scrutinized to ensure that the arguments and claimed facts are valid.²⁷

The European Commission has previously supported regionally restricted hunting for management purposes for species that have favourable conservation status. In its guidance document on strict protection, it

²³ It should nevertheless be noted that the Court of Justice has indicated that hunting may be a “judicious use”, by way of derogation, of even birds that cannot ordinarily be hunted under the Birds Directive. Judgment of the Court of 11 November 2010, *Commission v Italy* (C-164/09, EU:C:2010:672).

²⁴ Ministry of Agriculture and Forestry, *Management Plan for the Wolf Population in Finland* (2015).

²⁵ See Opinion of Advocate General Bot of 20 February 2018, *Commission v Poland* (C-441/17, EU:C:2018:80, paras 144–148), arguing that management measures that have the effect of rendering conservation ineffective cannot be considered conservation measures.

²⁶ Even in cases of infectious disease, where killing individual animals is considered most likely to benefit the larger population, it is controversial whether killing actually works. See, for example, N. Beeton, & H. McCallum, “Models Predict that Culling is not a Feasible Strategy to Prevent Extinction of Tasmanian Devils from Facial Tumour Disease”, *Journal of Applied Ecology*, 2011 Vol. 48, Issue 6, p. 1315.

²⁷ See Judgment of the Court of 17 April 2018, *Commission v Poland* (C-441/17, EU:C:2018:255, e.g. paras 162–180), analyzing whether supposed conservation measures had the effect claimed.

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positively cites the Latvian lynx management plan, under which hunting is used to manage the population.²⁸ The Commission states that according to this plan, “limited and strictly controlled taking by hunters is considered to have a positive impact on the population as well as on public perception.”²⁹ However, that management plan contained no evidentiary showing that hunting had a positive impact on the population or on public perception.³⁰ Since Member States have the burden of proving that the conditions of derogation are met,³¹ Latvia’s 2002 management plan would likely be considered 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 in its 2007 *Finnish wolf* judgment. Regardless of whether hunting is accepted as a tool for the conservation management of flourishing populations, however, it would violate the spirit and purpose of the Habitats Directive to allow hunting of populations that do not have favourable conservation status.

2.2 Hunting and the formal requirements of Article 16(1)(e)

Article 16(1)(e) imposes a number of additional restrictions on derogation. Regionally restricted hunting carried out by individual hunters appears to fail to meet several of these conditions, in particular the conditions that the derogation must be selective and allow the taking or keeping of only “certain specimens of the species listed in Annex IV.”

The phrase “certain specimens of the species listed in Annex IV” indicates that the derogation must pertain to certain individual animals. This is in contrast to similar language in the Birds Directive Article 9(1)(c), which allows for derogation for the judicious use of “certain birds.” This might be interpreted as restricting derogation to certain species of birds. However, the “certain specimens of the species” language in the Habitats Directive clearly refers not to species, but to individuals. Regionally restricted hunting is by definition not restricted to certain specimens, but rather to members of a species in a particular region. Therefore, it is unlikely to meet the conditions laid out in Article 16(1)(e).

The difficulty in meeting this requirement when allowing regionally restricted hunting is illustrated by the facts of the *Tapiola* case. As noted above, hunters were asked to target young wolves or individual wolves that were causing problems, and to avoid killing members of the alpha pair. However, there was no actual restriction on killing any wolf within the designated territory, and no measures were taken to ensure that particular animals were targeted or not. In fact, nearly half of the 44 wolves killed during the contested hunting season were alphas.³² Of the seven wolves killed pursuant to the contested permits, four were alpha individuals. In one of the contested applications, wolves in the area were alleged to have

caused damage, but it is not known if the wolves killed were those that caused the damage. In the other, no particular or significant damage was alleged. It is unknown how many of the wolves killed, if any, were causing problems. For these reasons, the hunt cannot be considered to have met the condition under Article 16(1)(e) that derogation be limited to certain specimens.

Another requirement of 16(1)(e) is that derogation be limited in extent and number. In the context of a regionally restricted hunt, the “limitedness” must be considered in relation to the total number of permits granted each year, and not for each decision to grant an individual permit. That is, the cumulative impact of killing individual specimens of Annex IV species must be considered when setting the maximum number of allowable 16(1)(e) derogations.³³ Otherwise, it may be possible to kill nearly all of the strictly protected population by making multiple individual decisions. Therefore, when setting a maximum number of animals that may be killed under Article 16(1)(e) in a national regulation or any other type of decision making, the total allowable number of permits for the year must be “limited”. The Court has not yet addressed what “limited” means in this context.

Interpreting a similar condition in Article 9(1)(c) of the Birds Directive, however, the Court has stated that the requirement that only “small numbers” be taken “cannot be satisfied if it does not ensure the maintenance of the population of the species concerned at a satisfactory level.”³⁴ The Court has endorsed the recommendation of the ORNIS Committee for the Adaptation to Technical and Scientific Progress under

²⁸ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), pp. 57–58.

²⁹ *Ibid.* at p. 57.

³⁰ J. Ozolins, *Management plan for Eurasian lynx (Lynx lynx) in Latvia* (2002).

³¹ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, para. 25).

³² Ministry of Agriculture and Forestry, “Press Release: Evaluation of Wolf Hunting for Population Management – Hunting Continues with Some Changes” 2016, available at http://mmm.fi/en/article/-/asset_publisher/evaluation-of-wolf-hunting-for-population-management-hunting-continues-with-some-changes (last accessed 3 May 2018).

³³ See Judgment of 8 June 2006, *WWF Italia and Others v Regione Lombardia* (C-60/05, EU:C:2006:378, paras 28–29), holding that the national regulatory framework for granting derogations under the Birds Directive article 9(1)(c) must ensure that at the national level, “authorised hunting does not exceed a ceiling consistent with the restriction on that hunting to small numbers imposed by that provision, and that ceiling must be determined on the basis of strict scientific data.”

³⁴ Judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others v Premier ministre and Ministre de l’Aménagement du territoire et de l’Environnement* (C-182/02, EU:C:2003:558, para. 17).

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the Directive, which suggested that hunting strictly protected bird species under Article 9(1)(c) must be limited to less than 1 percent of total annual mortality.³⁵ In its Birds Directive guidance, the European Commission suggests that hunting should have a “negligible effect” on the species population as a guideline for Article 9(1)(c) derogations.³⁶ This implies that it should not be possible to differentiate between the growth of a hunted population and a non-hunted population.

The Habitats Directive does not say “small numbers”, it says “limited numbers”, so it is unclear as to the extent to which the Birds Directive jurisprudence applies. Interpreting the “limited numbers” criterion in the Habitats Directive, the European Commission advises that “[d]erogations should not be granted where there is a risk that the derogation might have a significant negative effect on the population concerned.”³⁷ However, we would argue that the “negligible effect” standard, or less than 1 percent of total mortality, may be more appropriate, especially for species that do not have favourable conservation status. Article 16(1)(e) is intended to impose “significant constraints” above the requirements of the other derogation grounds.³⁸ If it did not, the other derogation grounds would not be necessary because all derogations could be granted under Article 16(1)(e). Favourable conservation status of a species population in its natural range is a necessary precondition for granting derogation under Article 16(1).³⁹ While exceptions may be made in exceptional cases,⁴⁰ they must be particularly limited for Article 16(1)(e) derogations where there is no clear countervailing interest to be balanced as there is in the other derogation grounds.

A regionally restricted hunt that reduces a population of a strictly protected species is unlikely to meet the requirements for a limited hunt, as again illustrated by the *Tapiola* case. The known 2016 wolf mortality in Finland was 78 wolves, or nearly a third of the total population. One percent of total known mortality would be less than one wolf. Even if the actual mortality was much higher, the maximum that could constitute less than one percent of total mortality would be 2-3 wolves, considering that the total wolf population estimate for that year was 275-310 wolves.⁴¹ The maximum allowable 16(1)(e) derogations were set at 46 wolves, with 46 such permits actually granted. This is far higher than can be allowed under Article 16(1)(e). Hunting under Article 16(1)(e) in fact accounted for more than 50 percent of total known mortality, and the mortality of around 15 percent of the total living population.⁴²

The exact percentage allowable may vary by species and what is appropriate for birds may not be systematically appropriate for terrestrial mammals. Using the “negligible effect” test instead of the 1 percent test, the regional hunt also failed, as the population was shown to have decreased substantially in the years immediately following the hunt.

III. Hunting for the Purpose of Preventing Poaching

The claim is often made, as it was in the *Tapiola* case, that regionally restricted hunting is necessary to increase tolerance for a species and thereby prevent poaching. Article 16(1) would require that in order to allow any killing of strictly protected species to prevent poaching, there must be no satisfactory alternative. It is unlikely this condition can be met.

Allowable derogation from the system of strict protection required by Article 12 can be generalized as falling into two categories: The first category consists of exceptions that are intended to benefit species or habitats (e.g., species reintroduction programs), and thereby constitute measures “pursuant to [the Habitats Directive, designed to] maintain or restore, at favourable conservation status, natural habitats and species” under Article 2(2) of the Directive. The second category consists of exceptions that serve some countervailing interest that must be weighed against the Directive’s conservation objectives (e.g., the prevention of serious property damage). In either case, the derogation must be proportionate to its objective.⁴³

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³⁵ Judgment of 8 June 2006, *WWF Italia and Others v Regione Lombardia* (C-60/05, EU:C:2006:378, paras 26–27, and cases cited).

³⁶ European Commission, *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds “The Birds Directive”* (2008), p. 62.

³⁷ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p. 56.

³⁸ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p. 57.

³⁹ Judgment of 10 May 2007, *Commission v Austria* (C-504/04, EU:C:2007:274, para. 115).

⁴⁰ The Court has held that derogation remains possible “by way of exception where it is duly established that they are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at favourable conservation status.” Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, para. 29).

⁴¹ It is now thought that this population estimate was inaccurate, and likely too high. H. Andrén *et al.*, *An evaluation of the scientific quality of Finnish wolf population monitoring* (2016), available at https://www.luke.fi/wp-content/uploads/2016/10/Wolf_report_final_version.pdf.

⁴² Ministry of Agriculture and Forestry, “Press Release: Evaluation of Wolf Hunting for Population Management – Hunting Continues with Some Changes” 2016, available at http://mmm.fi/en/article/-/asset_publisher/evaluation-of-wolf-hunting-for-population-management-hunting-continues-with-some-changes (last accessed 3 May 2018).

⁴³ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), pp. 19 and 62.

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presumably is intended to benefit the species concerned and therefore fall in the first category. While measures to reduce poaching may be necessary or appropriate if they are designed to maintain or restore the favourable conservation status of the species, measures to reduce poaching that do not maintain or restore the favourable conservation status of the species are not. Preventing poaching, in and of itself, is not a goal of the Habitats Directive. Reducing illegal behavior (poaching) by making it legal (hunting) does not directly benefit species. If a species population decreases due to legal hunting, poaching may also be reduced, but overall human caused mortality will have increased. Measures to reduce poaching can only be justifiable if they contribute to the maintenance or restoration of favourable conservation status.

To contribute to the maintenance or restoration of favourable conservation status, legal hunting must reduce poaching by a greater number of individuals than are killed by legal hunting. It is not relevant for conservation status whether “tolerance” for the species increases, but rather whether the total human caused mortality decreases and the population increases. There is no demographic evidence supporting the theory that the availability of regionally restricted hunting leads to a population increase.⁴⁴ Evidence has largely shown that to the contrary, hunting vulnerable species populations leads to a decrease in those populations.⁴⁵ Conservation actions are supposed to reduce mortality and not to increase it or add new mortality sources.

The findings of a Finnish study published in 2018 on the link between poaching and legal hunting were inconclusive. While results “supported the assumption that legal hunting decreased illegal killing”, it also found that higher bag limits “increased the likelihood of poaching”.⁴⁶ It further elaborated that any reduction in poaching when the bag limit for legal hunting was increased might be the consequence of a decrease in the number of wolves available to kill in that area.⁴⁷

The precautionary principle is applicable to the Habitats Directive,⁴⁸ as it is to EU environmental law generally. This principle would weigh against allowing the killing of individual specimens of strictly protected species through regionally restricted hunting when there is no scientific evidence that doing so would reduce overall human caused mortality. That is, the certain killing of strictly protected animals is not a precautionary or proportional method of preventing the speculative killing of strictly protected animals. Furthermore, the Court stated in *Hilde Orleans and Others v Vlaams Gewest* (Joined Cases C-387/15 and C-388/15) that measures that result in the loss of part of a protected Natura 2000 site cannot be considered conservation measures.⁴⁹ By analogy, measures that result in the loss of part of a protected species population cannot be considered conservation measures according to Article 2(2) of the Habitats Directive.

It is therefore unlikely that Member States can show that regionally restricted hunting is an effective or proportional method for reducing poaching to conserve species populations, particularly those which do not have favourable conservation status. It is *a fortiori* unlikely that Member States can meet their burden of showing that there is no satisfactory alternative method for reducing poaching to conserve species populations, that is, that hunting is the only effective method for reducing poaching. Potential alternatives such as education programs or legal enforcement would have to be shown to be less satisfactory than hunting.

The *Tapiola* case again provides a cautionary example of the incongruence of using legal hunting to combat poaching. Finland argued that allowing regionally restricted hunting is the only way to protect the wolf population. The result of its regionally restricted wolf hunts indicates that hunting is no way to protect the wolf population at all. According to its 2015 management plan, the Finnish wolf population declined an average of 15 percent per year between 2006 and 2010. The plan cites a study that had inferred that about 30 wolves per year must have been poached.⁵⁰ Finland concluded that legal hunting was the only way to address this problem.

⁴⁴ Y. Epstein, “Killing Wolves to Save Them? Legal Responses to ‘Tolerance Hunting’ in the European Union and United States” *Review of European, Comparative & International Environmental Law*, 2017 Vol. 26, issue 1, p. 19, 28; G. Chapron & A. Treves, “Blood Does Not Buy Goodwill: Allowing Culling Increases Poaching of a Large Carnivore.” *Proc. R. Soc. B*, 2016 Vol. 283, Issue 1830; see G. Chapron *et al.* “Conservation and control strategies for the wolf (*Canis lupus*) in western Europe based on demographic models”, *Comptes Rendus – Biologies* 2003 Vol. 326, issue 6, p. 57. Figure 2 in that paper shows how population growth rate declines as soon as mortality increases. Similarly, Figure 6a shows how hunting increases extinction risk: harvesting larger fractions of population as soon as it is growing (threshold on population growth rate = 1 on the figure) leads to extinction probability surging.

⁴⁵ A. Benítez-López *et al.*, “The impact of hunting on tropical mammal and bird populations”, *Science* 2017 Vol. 356, Issue 6334, p. 180. The authors conducted a large-scale meta-analysis of hunting trends and impacts across the tropics and found bird and mammal populations were considerably lower in areas where hunting occurred.

⁴⁶ J. Suutarinen & I. Kojola, “One Way or Another: Predictors of Wolf Poaching in a Legally Harvested Wolf Population”, *Animal Conservation*, forthcoming 2018 at 6.

⁴⁷ *Ibid.* at 6–7.

⁴⁸ Judgment of 11 April 2013, *Peter Sweetman and Others v An Bord Pleanála* (Case C-258/11, EU:C:2013:220, para. 48).

⁴⁹ Judgment of 21 July 2016, *Hilde Orleans and Others v Vlaams Gewest* (Joined Cases C-387/15 and C-388/15, EU:C:2016:583, paras 37–38).

⁵⁰ M. Pohja-Myrkrä & S. Kurki, *Kansallisen suurpetopoliitiikan kehittämisarviointi* (Reports 114, Ruralia Institute,

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In the hunting year challenged however, 46 regionally restricted hunting permits to kill wolves were granted and 44 wolves were killed. Even if poaching had indeed been responsible for the deaths of 30 wolves, remedying this illegal killing with the legal killing of 44 wolves means this “conservation measure” resulted in an additional loss of 14 wolves. This is assuming absolutely all poaching stopped when legal hunting was implemented, which is unlikely. If some level of poaching continued, the total loss of individuals is even higher.

Again, the fact that the wolf population decreased in the years immediately following the hunt implies that hunting was not an effective conservation measure. For hunting to be a successful conservation measure, population size would have needed to increase, and by more than if the hunt had not taken place.

A related issue is whether a Member State can have multiple justifications for allowing a single hunting permit. Permits have been granted based on arguments that hunting was needed to manage the population, prevent poaching, prevent harm to domestic dogs, and increase the general feeling of public security.⁵¹ When there are multiple reasons for allowing derogation from strict protection, all conditions must be met for at least one derogation ground. When allowing derogation under Article 16(1)(e), the conditions that no satisfactory alternative exist and that populations’ favourable conservation status is maintained must of course be complied with, along with the extensive additional restrictions of that derogation ground. In this case, hunters were asked to state in their applications reasons for wanting to kill wolves, such as whether damage had been caused. However, the decisions to allow hunting did not include a statement of reasons as to the absence of a satisfactory alternative, only cursory statements that none existed. By claiming management as a purpose and Article 16(1)(e) as a derogation ground, Finland avoided giving a fully investigated statement of reasons as to what problems were caused by wolves and why there were no satisfactory alternatives for solving them, as it would have been required to do if granting derogation under, for example, Article 16(1)(b), the prevention of serious damage. The number of permits granted was much too high for derogation under any derogation ground considering the size and conservation status of the population, but was especially much too high to meet the additional requirements of Article 16(1)(e). By combining purposes, Finland attempted to avoid fully meeting its obligations under any derogation ground. If Member States cannot meet their burden of demonstrating a lack of satisfactory alternatives for granting derogations that have the objective of satisfying a countervailing interest that must be weighed against the Directive’s conservation objectives, they may not avoid the obligation to do so by claiming a conservation purpose.

IV. At What Level Should Favourable Conservation Status be Considered?

The “favourable conservation status” of habitats and species is one of the goals of the Habitats Directive. What, exactly, this means has been frequently controversial.⁵² Article 16(1) requires that derogation not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. It is in question at what level the conservation status of species should be assessed for the purpose of allowing derogation.

According to Article 1(i), “conservation status of a species” is assessed at the EU level based on the “long-term distribution and abundance of its populations.” The conservation status of species at the EU level is of course dependent on their conservation status within the Member States. Member States are therefore required to take measures to maintain or restore the favourable conservation status of habitats and species. According to the principle of sincere cooperation, and Article 4(3) of the Treaty on European Union, Member States must seek to fulfil the obligations imposed by directives regardless of how successful other states are in fulfilling their obligations. If a species has favourable conservation status in some Member State or elsewhere, other Member States are not thereby relieved of their duty to maintain or restore the favourable conservation status of species within their own borders.⁵³ To determine Member States’ success at meeting the requirements of the Directive, conservation status must therefore also be assessed at the Member State level.

As indicated by Article 16(1), conservation status is additionally assessed at the population level. Member States must maintain *populations* of the species at favourable conservation status. The term “population” however does not have any agreed upon scientific meaning,⁵⁴ and the meaning can vary

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University of Helsinki 2014). It is far from certain however that the level of poaching was so high as claimed, since poaching is very hard to verify.

⁵¹ *Reference for a Preliminary Ruling in the Tapiola Case*, KHO:2017:182 at paras 74–75.

⁵² A. Trouwborst *et al.*, “Interpreting ‘Favourable Conservation Status’ for Large Carnivores in Europe: How Many are Needed and How Many are Wanted?” *Biodiversity and Conservation* 2017 Vol. 26, issue 1, p. 37.

⁵³ H. Schoukens & K. Bastmeijer, “Species Protection in the European Union: How Strict is Strict?” in C. Born *et al.*, eds, *The Habitats Directive in its EU Environmental Law Context: European Nature’s Best Hope?* (Routledge 2015).

⁵⁴ Y. Epstein, “Favourable Conservation Status for Species: Examining the Habitats Directive’s Key Concept through a Case Study of the Swedish Wolf” *Journal of Environmental Law* 2016 Vol. 28, Issue 2, p. 221, 241, citing R. Waples, and

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depending on context. Although there have not been any rulings directly on this issue, the legal meaning of “population” as used in the Habitats Directive has been developed through its use by the Court of Justice. The Court’s jurisprudence suggests that populations (with the exception of migratory bird populations) should be considered at the Member State level or smaller. It also suggests that when conservation status is not favourable at the Member State level, conservation status must be considered unfavourable in deciding whether to allow derogation under Article 16(1), even if some local populations have favourable conservation status. This position is justified from an ecological perspective, because achieving favourable conservation status at the Member State level is dependent on the growth of populations at local levels.

The *Finnish wolf* case (C-342/05) is the most relevant case on derogation when conservation status is unfavourable. When considering the permissibility of derogating under Article 16(1)(b), the Court noted that wolves did not have favourable conservation status in Finland.⁵⁵ In this case, conservation status was considered at the Member State level. The conservation status of wolves in other countries was not relevant. Because conservation status was not favourable at the Member State level, it was also not necessary to examine whether the local populations in the areas impacted by the derogation had favourable conservation status.

The Court has discussed the conservation status of species populations in the context of the system of strict protection required by Article 12. In the *French hamster* case (C-383/09), the Court stated that there were “no populations of the species in Alsace which reached its minimum viable population threshold,” indicating that it considered there to be multiple hamster populations whose conservation status should be assessed in Alsace.⁵⁶ The court did not consider that the hamsters were part of a larger metapopulation that extends to Hungary.⁵⁷ This supports the position that conservation status of species populations within Member States, or smaller regions, is the correct level of assessment when determining whether the requirements of strict protection are met or derogation can be allowed.

The position that the term “population”, as used in Article 16(1), should mean local populations rather than metapopulations or other understandings of population is also supported by the Commission’s guidance. The Commission argues that assessment of the impact of derogation on conservation status is likely to be more ecologically meaningful if it is made at the local population level. Further, it argues, because derogations “must be applied appropriately in order to deal with precise requirements and specific situations,” assessments at the local population level are “normally essential”.⁵⁸ Of course, negative impact on populations at higher levels would also weigh against granting a derogation.

While assessment of conservation status must be made at a population level that is appropriate to the

nature of the derogation, conservation status at other levels must also be assessed. According to Article 16(1), conservation status within the natural range of the populations must also be considered, indicating assessment at the biogeographical is required. Derogation may not be detrimental to the maintenance of favourable conservation status at any level: the EU level, the Member State level, the biogeographical level, or the population level.

If conservation status is not favourable, derogation may nevertheless be allowed in very rare circumstances. Allowing regionally restricted hunting is almost certainly not one of these circumstances. The text of Article 16(1) states that derogation can only be allowed if it is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status. The Court has interpreted this provision to mean that favourable conservation status in the species’ natural range is “a necessary precondition” for granting derogation.⁵⁹

The *Finnish wolf* case carved out a very narrow exception, however, where the killing of an individual member of a strictly protected population that does not have favourable conservation status would not worsen the unfavourable conservation status of the populations concerned nor prevent their restoration at a favourable conservation status.⁶⁰ As the court has held in several instances relating to the Birds Directive, the possibility for derogation allows for proportional measures to address “precise requirements and specific situations.”⁶¹ The exception carved out in the *Finnish*

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O. Gaggiotti, “What Is a Population? An Empirical Evaluation of Some Genetic Methods for Identifying the Number of Gene Pools and Their Degree of Connectivity” *Molecular Ecology* 2006 Vol 15, p. 1419, 1420.

⁵⁵ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, para. 27).

⁵⁶ Judgment of 9 June 2011, *Commission v French Republic* (C-383/09, EU:C:2011:369, para. 24).

⁵⁷ See A. Trouwborst *et al.*, “Interpreting ‘Favourable Conservation Status’ for Large Carnivores in Europe: How Many are Needed and How Many are Wanted?” *Biodiversity and Conservation* 2017 Vol. 26, issue 1, p. 37, 49; Y. Epstein, *et al.*, “A Legal-Ecological Understanding of Favorable Conservation Status for Species in Europe”, *Conservation Letters* 2016 Vol. 9, Issue 2, p. 81, 83.

⁵⁸ European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), p. 61.

⁵⁹ Judgment of 10 May 2007, *Commission v Austria* (C-504/04, EU:C:2007:274, para. 115).

⁶⁰ Judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, para. 29).

⁶¹ Judgment of 8 July 1987, *Commission v Belgium* (C-247/85, EU:C:1986:458, para. 7; Judgment of 8 July 1987, *Commission v Italy* (C-262/85, EU:C:1987:340, para. 7); Judgment of 7 March 1996, *WWF Italy v Regione Veneto*, (C-118/94, EU:C:1996:86, para. 21).

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wolf case recognizes that there may be a countervailing interest in a specific situation so strong that it can prevail over the requirements of strict protection, even if the population does not have favourable conservation status. For the reasons already given, neither management through regionally restricted/exploitive hunting nor the prevention of poaching can be regarded as such an interest.

In practice, it should be very hard to apply this exception under any derogation ground, especially in cases of killing. The killing of a healthy member of a population that is too small – one that does not have favourable conservation status – is likely to be detrimental to the population. Killing individual animals, even those that have not yet reproduced, removes the possibility that animal will reproduce in the future, and thus is detrimental to restoring favourable conservation status.

V. Conclusion

The Habitats Directive allows Member States to permit the killing of strictly protected species only in exceptional and very restricted circumstances. The “regionally restricted”, “quota”, “exploitive” or “management” hunting of these species, particularly large carnivores such as wolves, has nevertheless been allowed, under various names, in several Member States. The eventual ruling in the *Tapiola* case may require these Member States to revise their hunting laws and policies, as well as impact how the requirements for derogation from species protection are understood and applied more broadly. In this final section, we summarize our conclusions as to how the questions at issue in this case may be resolved.

The Court will likely rule that Article 16(1)(e) can never be used to permit exploitive or regionally restricted hunting by individuals if the species does not have favourable conservation status. For the reasons above, we think the Court should also rule that, contrary to the Commission’s position stated in its guidance with regard to the Latvian lynx,⁶² this type of hunting should not be allowed even if the species does have favourable conservation status, at least not in numbers that have more than a negligible impact on the population. Measures which reduce the population of a strictly protected species cannot be considered conservation measures within the meaning of the

Habitats Directive and therefore should be considered an impermissible means for managing a population of that species.

If a national management plan sets an annual maximum number of animals that can be killed under Article 16(1), that cumulative total should be below the threshold that may be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. If a national management plan sets an annual maximum number of animals that can be killed under Article 16(1)(e), that cumulative total should also be below the threshold that may be taken under the additional conditions of that more restrictive derogation ground. The cumulative effect of derogations made under Article 16(1)(e) on species populations should be negligible.

Preventing poaching cannot be a justification for killing members of a strictly protected species, as the available evidence suggests that it leads to an increase rather than decrease in total human caused mortality of strictly protected populations. Measures that result in a loss of part of a population of a strictly protected species cannot be considered conservation measures.

The condition in 16(1) that derogation may not be allowed if it is detrimental to the maintenance of the populations of the species concerned at a favourable conservation status should be assessed in the area that will be affected by the derogation. That is to say, derogation should not be detrimental to the conservation status of the local population concerned. Additionally, derogation should not be detrimental to the maintenance of favourable conservation status at the Member State level. If conservation status is not favourable at the Member State level, conservation status should be considered unfavourable when deciding whether to allow derogation under Article 16(1). Conservation status should accordingly be assessed at the Member State level as well as at the local population level. Regardless of whether species populations are abundant or endangered elsewhere, each Member State should seek to maintain or restore their favourable conservation status within their own borders.

⁶² European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC* (2007), pp. 57–58.