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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

This article centres on the effectiveness of Article 258 TFEU proceedings for the enforcement of EU environmental law. Employing as an example the case between the Commission and Sweden on the licensed hunting of wolves – a species enjoying strict protection in accordance with the Habitats Directive – the pros and cons will be discussed of infringement proceedings for the enforcement of the common responsibilities in the environmental area. While these proceedings can be effective in situations where they are used, they suffer unpredictability and a lack of consistency owing to political balancing within the Commission. Furthermore, lack of transparency in communication between the Commission and the governments of the Member States prevent public scrutiny of the system, which contributes to alienation of the EU from the public. Finally, on areas of environmental law – which are highly dependent upon scientific expert knowledge and thus dominated by ‘soft guidelines’ – infringement proceedings are an important complement to references from national courts to CJEU for preliminary rulings on controversial issues in order to avoid ‘circular decision-making’.

Thus, the Swedish wolf issue can serve as a background for a more general discussion on infringement proceedings as an effective means for the enforcement of environmental law within the Union.

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1. Introduction

The protection of wolves is certainly not the most crucial environmental issue in the Union. The controversies surrounding this area of law, however, are of considerable interest given the impact between EU environmental law and national law in a more general context. There are two reasons for this: first, the competence of the Union in regulating nature conservation and species protection is still questioned in many regions, reflecting a resistance towards ‘bureaucrats from Brussels’ intervening in the ‘way-of-life’ of rural areas. Such conflict carries with it a city against countryside – or centre against periphery – aspect, which ought not to be underestimated. Second, this is an area of law where traditionally in many Member States the administration is assigned to represent ‘common interests’, excluding outsiders from having a say in any decision-making. Thus the introduction of the means to allow the public to challenge in court such administrative decisions is fairly recent.

On such an area of law the challenges in implementing Union law into national law are particularly problematic. Here, as elsewhere, the possibility open to the Commission to bring infringement proceedings represents an important means of accomplishing common responsibilities. But, as is shown in the Swedish wolf case, this instrument is highly political and therefore dependent upon other priorities than enforcement of EU law. This is also one of the main reasons why it is crucial to strengthen the means through which the public concerned is able to challenge decision-making in national courts, thus allowing for the CJEU, by way of preliminary rulings, to have the final say on such matters. In fact, the importance of Article 267 proceedings needs to be emphasised in times where the Commission seems to be stepping down from its enforcement responsibilities in environmental matters.

In this article the controversy is described surrounding wolves in Scandinavia together with Swedish wolf management and infringement proceedings from the Commission, beginning in late 2010. As of now, the Swedish government is in open defiance of the Commission and proceeds with a licensed hunt that both the Commission and the Swedish courts consider a breach of EU law. Despite this open contempt for the rule of law the Commission has failed to act. This has resulted in a major loss of trust capital in a political area with great importance – not only for environmental law in Europe, but also for the relationship between the Union and Member States on a more general level. In light of this story,

the pros and cons of infringement proceedings will be discussed, as well as the importance of requests for preliminary rulings from the national courts on controversial areas of European environmental law.

2. Wolves in Scandinavia

Owing to intensive persecution on the part of farmers and landowners, the wolf population in the late 1960s became functionally extinct in the Scandinavian peninsula. However, since hunting was banned in 1964 there has been a revival. This recovery started slowly. From three wolves in the early 1980s, numbers grew to six some 20 years later. By the start of the new millennium growth had become stronger, with numbers increasing to nearly 50 in 2004 and to more than 200 by 2010. The population peaked at around 415 in Sweden (winter count 2014/15), but has currently gone down to about 340 (2015/16). This figure, however, does not take account of natural deaths, poaching, licensed hunting or protective hunting during the survey period. Packs have been established in several territories, most of them in central Sweden. Apart from last year, the yearly population increase has been around 15 per cent. The wolf population has also been spreading towards the eastern and southern parts of the country. However, the genetic base for the population is extremely small and inbreeding coefficients high. The present population results from a natural recolonization of no more than five wolves from the neighbouring Finnish/Russian population in Karelia. It was not until about ten years ago that newcomers from the east succeeded in passing the reindeer herding areas in Finland and Sweden and began contributing genetically to the population. A successful translocation of a wolf pair to the southern part of Sweden was additionally undertaken in 2013. As of now, this pair has not succeeded in spreading their genes into the Swedish-Norwegian wolf population and no further wolves have managed to reproduce with the Scandinavian wolf population until this spring, when an eastern male successfully bred with a Scandinavian wolf. Though a number cross the border to Sweden and Norway each year, few survive the passage through the reindeer husbandry area. Thus, it is commonly understood that the main problem for the Scandinavian wolf population is not numbers but poor genetic status.

In Sweden the wolf issue is intensely controversial. Wolf establishment is widely regarded to be incompatible with Sami reindeer herding in northern parts of the country. There is also a conflict with sheep farming,

though this can be successfully resolved in many instances with electric fences and by other proactive measures. However, the main objection to the rehabilitation of the wolf population comes from hunters and their organisations, mainly because wolf predation on dogs makes hunting difficult and risky. Hunters also consider wolves to be competitors for game species, such as deer and elk. Some hunters, and non-hunters, also express fears for their personal safety from direct wolf attack or from zoonosis transmission. The wolf issue also takes on a clear dimension of conflict between urban and rural, centre and periphery – ‘us and them’ – elevating it to the symbolic. It is also highly political. Resistance to wolf recovery is strong and poaching is regarded as widespread. In fact, almost 20 per cent of wolf mortality is estimated to result from illegal hunting and accidents.

To summarize: nearly extirpated by the mid-20th century, Sweden’s wolf population currently numbers between 300 and 400 animals. This population nevertheless remains fragile: all individuals are descended from only five ancestors and consequently suffer from genetic problems related to inbreeding. The species is red listed (‘vulnerable’) in Sweden pursuant to IUCN guidelines and it is debatable whether or not it enjoys favourable conservation status (FCS) according to EU law. However, as in many European countries with recovering wolf populations, protection for wolves is opposed by some as fervently as it is supported by others.

3. The Swedish wolf management system

3.1 The legal framework

Sweden is party to the Bern Convention on the Conservation of European Wildlife, as is the EU.¹ The Bern Convention is implemented in the EU through the Habitats Directive.² Both prohibit the killing of strictly protected species except in certain circumstances where specified criteria are met. The Habitats Directive protects biodiversity by directing Member States to take measures to “maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and

¹ Convention on the Conservation of European Wildlife and Natural Habitats, CETS 104 (19 Sept. 1979).

² Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (1992L0043).

flora of Community interest”.³ Member states are also required to ban the deliberate capture or killing of those species deemed in need of strict protection, such as wolves.⁴ Exceptions may be made for one of five enumerated reasons, and only where there is “no satisfactory alternative” and “derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range”.⁵ The two listed reasons most commonly used as justification for culling wolves are (b) the prevention of serious damage and (e) *to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking and keeping of certain specimens by the competent national authorities.*

3.2 Decisions on licensed hunting 2009–2010 and 2013–2014

As with any social controversy the wolf debate has been illuminated and discussed in Sweden in the media, in commission reports, government investigations, and research articles.

Today's wolf policy began with the assignment of a commission to investigate the matter in 2006. In its report the commission proposed ‘management hunting’ of the species. The proposal was largely accepted by the government and new legislation was enacted in autumn 2009. The cornerstone of the new wolf policy was a cap on total population in Sweden to not more than 210 specimens and at least 20 litters born per year over the coming three years. This level was to be maintained through protective hunting and licensed hunting. Furthermore, the policy mandated the introduction of up to 20 wolves from Finnish/Russian Karelia in order to strengthen the population's genetic diversity. It also confirmed the position that in principle no wolves should be allowed within the all-year-round reindeer herding regions of northern Sweden.

Within the framework of the parliamentary decision the new policy was managed by the Swedish Environmental Protection Agency (SEPA). The idea was that each year the authority would decide on the ‘licensed hunting’ of a certain number of wolves in different regions. The hunt was allowed under Article 16.1.e, as implemented in Swedish hunting

³ Article 2 of the Habitats Directive.

⁴ Article 12 and Annex 4 of the Habitats Directive.

⁵ Article 16.1 of the Habitats Directive.

law. SEPA authorized hunting seasons both in early 2010 and again in early 2011 with a bag limit of 27 and 20 wolves respectively. Several environmental non-governmental organisations (ENGOS) appealed those decisions but were dismissed because the organisations were found not to have standing under Swedish law. The European Commission also objected, initiating an infringement proceeding against Sweden in January 2011 on the grounds that the licensed hunting was neither sufficiently selective nor limited. Faced with a Reasoned Opinion during the summer of 2011,⁶ the government – as the saying goes – ‘made a poodle’.⁷ Without actually abandoning any of its standpoints on the legal issues, it now declared that the set limit of 210 wolves in the country was no longer in force and that there would be no ordinary decision on licensed hunting for 2012.

However, political pressure from farming and hunting organisations increased and despite the Commission’s warnings, SEPA decided to allow a hunting season in early 2013 with a bag limit of 16 wolves. But in the meantime, CJEU’s case law on standing for the public concerned in environmental matters had begun to influence the jurisprudence of the Swedish administrative courts concerning hunting decisions. In the *Slovak Brown Bear* case (2011), the CJEU ruled that national courts must, *to the extent possible*, interpret national procedural rules in such ways *so as to enable* ENGO standing to appeal national implementation of EU environmental laws, in particular the Habitats Directive.⁸ The final confirmation that these organizations are bearers of EU law on the environment came in *Trianel* (2011) where the court stated that the “*rights capable of being impaired*”, *which the [ENGOS] are supposed to enjoy must necessarily include the rules of national law implementing EU environmental law and those rules of EU environmental law having direct effect.*⁹

Accordingly, in summer 2012, Sweden’s Supreme Administrative Court (HFD) confirmed that the national standing laws must be interpreted to allow public interest lawsuits that challenged administrative decisions made under hunting legislation if the same criteria for ENGO

⁶ Reasoned Opinion about the wolf hunt, European Commission 2011-06-17, case No 2010/4200, see www.jandarpö.se/Övrigt material – however, only available in Swedish.

⁷ In Swedish the expression means to ‘roll over’ or ‘cave in’.

⁸ C-240/09 *Slovak Brown Bear* (2011), para 51. Summaries of these CJEU cases are available on the website of the Task Force on access to justice under the Aarhus Convention; <http://www.unece.org/env/pp/tfaj/jurisprudenceplatform.html>.

⁹ C-115/09 (2011), para 48.

standing to appeal decisions made under Environmental Code were met: the association must have nature or environmental protection as its primary purpose, as well as being non-profit, have at least 100 members or otherwise be able to show that it had “support from the public”, and had been active in Sweden for at least three years.¹⁰ Thus, when SEPA decided to allow licensed hunting in 2013, the ENGOs were able to appeal. The administrative court of appeals granted an injunction and later ruled that – as the Commission had earlier argued in its Reasoned Opinion – the hunt was neither sufficiently selective nor limited enough to meet the requirements of the Habitats Directive’s narrow derogation allowances of Article 16.1(e).

In the month following the administrative court’s decision, June 2013, a letter from a number of researchers at Skandulv – the Scandinavian wolf research project – claimed that the Scandinavian wolf population had reached FCS. This conclusion was based on the claim that the number of wolves was estimated to have reached 300 in Sweden and 30 in Norway and that their genetic status had been improved by the successful relocation of one pair of wolves from the north of Sweden to the central part of the country. The government concluded that FCS had indeed been reached and that a favourable reference population value (FRP) for the wolf should be set between 170 and 270. SEPA exercised its discretion to set the FRP within that range, choosing the maximum of 270 wolves, which was reported to the Commission at the end of the year in accordance with Article 17 of the Habitats Directive.¹¹ SEPA thereafter authorized a hunting season with a bag limit of 30 wolves to begin in February 2014. This hunt was to be “limited and controlled” and targeted at reducing the wolf population in those counties that had the most wolves. According to SEPA, the licensed hunting season would contribute to the general public’s increased tolerance for wolves and other carnivores, thus benefiting the affected species. Environmental organizations balked at this explanation and once again appealed the hunting decision. The administrative court granted an injunction, effectively putting an end to the 2014 hunting season before it began.

¹⁰ The *Kynna wolf case*; a summary is available on the website of the Task Force on access to justice under the Aarhus Convention; <http://www.unece.org/env/pp/tafaj/jurisprudenceplatform.html>.

¹¹ One year earlier, in autumn 2012, SEPA reported 380 animals as FRP to the Commission, to which the Minister of the Environment, Lena Ek, immediately responded in the media that 180 was sufficient.

Its judgement came at the end of the year, confirming that the hunt was in breach of the Habitats Directive. The court did not agree with SEPA that the directive allowed for measures aiming at “lowering the density of the wolf population”, but accepted the aim to “reduce the socio-economic consequences” of the existence of wolves. However, it did not find that the licensed hunt was a useful means of obtaining such an effect, nor did it find any good reasons as to why the chosen wolf territories were suitable for that purpose. In addition, the court argued that a hunting bag limit of 30 animals could not be regarded as “a limited number”. Accordingly, SEPA’s decision was found to be disproportionate in relation to its stated aim and was quashed.

3.3 The 2015 licensed hunting season

Not surprisingly, farming and hunting organizations opposed the courts’ new ability to halt via injunction and annul hunting decisions that did not comply with EU law, decrying the court’s actions as a “circus” and a “threat to democracy”. More surprisingly, the government – with support from a majority in Parliament – also reacted against ENGO standing with a proposal that made hunting decisions non-appealable in court. This proposal would move decision-making authority from SEPA to the regional County Administrative Boards (CABs). Under Swedish hunting law, decisions made by counties are appealable only to SEPA, but no further, whereas decisions originally made by SEPA can be appealed to the administrative courts. In response, the Commission opened a second infringement proceeding against Sweden in July 2014, arguing that a system where hunting decisions could not be appealed in court contravened both the Aarhus Convention and the principle of useful effect (*effet utile*) with regard to the Habitats Directive.¹²

The Swedish government nevertheless decided to go ahead with its plan to delegate responsibility for hunting decisions to the CABs. In October 2014 SEPA released its new national management plan for wolves for 2014-2019. This plan divided Sweden into three administrative districts. Within the central administrative district, which hosts most of Sweden’s wolves, hunting decisions would be made by the CABs. Each

¹² Letter of Formal Notice on judicial review of hunting decisions, European Commission 2014-07-01, case No 2014/2178.

county would decide how many wolves could be killed, so long as the decision complied with the Swedish hunting regulation.

Three CABs approved licensed hunting seasons to begin in early 2015 and allowed for a total bag limit of 44 wolves. As required by the hunting regulation they enumerated justifications for their decisions, which included protecting livestock and elk and enabling the Swedish tradition of using off-leash hunting dogs. They also noted the potential for improving the public attitude towards wolves themselves, as SEPA had previously argued. The CABs further asserted that hunting was the most appropriate solution because moving wolves from human inhabited areas would be prohibitively expensive. The decisions were appealed by the ENGOs to SEPA. As the decisions complied with the national wolf plan, SEPA affirmed them. Despite the ban on appeals the ENGOs challenged SEPA's decisions at the administrative court. The administrative court imposed injunctions in respect of the decisions because it found it doubtful that the ban was in harmony with EU law. However, the administrative court of appeal accepted the ban on judicial review of hunting decisions on the grounds that "there does not exist any EU law principle that goes beyond what is granted the public concerned according to the Aarhus Convention". This decision was in turn appealed by the ENGOs to the Supreme Administrative Court (HFD), which granted leave to appeal. However, the court did not halt the hunt and by the end of January a total of 42 wolves were shot in the three counties. This was significantly more than in any prior year. Interestingly, when the licensed hunt was decided for 2015, the Commission did not progress with its legal action.

Spurred on by this, the government allowed the CABs to decide that another hunt should take place in early 2016, now comprising more than 10 per cent of the population. It should also be noted that these decisions were taken after a renewed Reasoned Opinion from the Commission¹³ and in the midst of tough negotiations with DG Environment during the autumn that were held – at least according to the ENGO community – under threats of a lawsuit to the CJEU. Despite these factors the Commission again failed to react. However, soon afterwards the HFD disqualified the ban on appeals from the CABs to court. When the hunting decisions were subsequently appealed to the administrative court the hunt was stopped in two out of three regions. As this was a landmark case

¹³ Supplemented Reasoned Opinion on the wolf hunt, European Commission 2015-06-19, case No 2010/4200.

on the relationship between the Aarhus Convention and the principle of legal protection in EU law, as well as on the effective implementation of EU environmental law in Member States, the opportunity will be taken to present a more detailed summary of HFD reasoning.

3.4 The HFD's judgement on the appeals ban

To begin with, the HFD stated that the relevant provision in Article 12 of the Habitats Directive was unconditional and clear, requiring strict protection of the wolf. The case-law of the CJEU has created general principles of law, among them that of legal protection.¹⁴ To a certain extent these principles are today expressed in the Treaty of the European Union (Articles 4(3) and 19(1) para 2) and the Charter of Fundamental Rights of EU (Article 47). The court furthermore stated that according to established case-law of the CJEU concerning Article 288 TFEU, clear provisions in directives create “rights” that enjoy legal protection.¹⁵

HFD thereafter pointed to the fact that the CJEU has several times answered questions concerning what kinds of national procedural provisions are required to meet the obligations of the Habitats Directive, one such case being *The Slovak Brown Bear*. In this case, the CJEU referred to the principles of equivalence and effectiveness and concluded by stating the *so as to enable* formula, described above.

After that the HFD pointed to the fact that *The Slovak Brown Bear* concerned the interpretation of national procedural law, not a situation where there was an express appeals ban. However, the demands expressed in that case on how to interpret national law derive from the principle of useful effect (*effet utile*) of Union law. This principle not only requires Member States' courts to interpret national law in a manner faithful to EU law, but also implies that they must disregard those national procedural rules that are in conflict with clear provisions of EU law.¹⁶ Moreover, the HFD referred to the *Waddenzee* case where the CJEU stated “it would be incompatible with the binding effect attributed to a directive (...) to exclude, in principle, the possibility that the obligation which it

¹⁴ With reference to C-97/91 *Borelli*, paras 13–14 and C-562/12 *Lihaveis MTÜ*, paras 75.

¹⁵ With reference to C-41/74 *van Duyn*, paras 12–13.

¹⁶ With reference to C-106/77 *Simmenthal*, para 22, C-213/89 *Factortame*, para 20 and C-263/08 *Djurgården- Lilla Värtan*, para 45.

imposes may be relied on by those concerned". The CJEU furthermore stated in this case that (particularly where a directive provision imposed on Member States the obligation to pursue a particular course of conduct) the effectiveness of such an act would be weakened if individuals were prevented from relying on it before their national courts, and if the latter were prevented from taking it into consideration as an element of EU law in order to rule whether the national legislature had kept within the limits of its discretion set by the directive.¹⁷

According to the HFD, the statement of the CJEU in *Waddenzee* was to be understood as meaning that ENGOs had rights in accordance with the Habitats Directive of enjoying effective protection in court. It also found that the useful effect of the directive required that individuals could invoke the provisions therein and that the national court was free to evaluate if the law of the Member State was in line with the directive. In brief, this means that according to the HFD, Union law requires that the question of whether clear and unconditional provisions in the Habitats Directive have been implemented correctly in national law can be tried in a national court. The fact that the appeals ban also excluded the possibility of referring such a question to the CJEU by way of a request for a preliminary ruling reinforces the impression that such a provision is in breach of EU law. Thus the appeals ban in the Swedish Hunting ordinance was disregarded.

4. Infringement proceedings as a means of enforcing EU environmental law

4.1 The Commission's action in relation to the Swedish wolf hunt

The Swedish wolf issue raises a number of questions of great significance regarding the effective implementation of EU law in Member States. Most importantly, it illustrates the fact that standing for the public concerned to challenge administrative decision-making is crucial to implementing EU environmental law, especially in cases where there are no traditional bearers of the interests expressed in that regard. But it also presents an interesting example of how the Commission can use – or fail to use –

¹⁷ C-127/02 *Waddenzee*, para 66.

infringement proceedings when conflict with Member States becomes controversial. Two actions have been brought against Sweden on the wolf issue, one on the licensed hunt in substance and another on the appeals ban. For obvious reasons, the latter will now be closed after the Supreme Administrative Court's judgement in the *Appeals ban* case and the subsequent changes in Swedish hunting legislation. The first infringement case, however, continues to endure, despite lack of practical progress or remedial impact in respect of the issues at hand. The fact remains that the Swedish government openly challenged DG Environment by twice confirming licensed hunts, despite strong and repeated resistance from Brussels. It is commonly believed that the attitude of DG Environment is not shared by other parts of the Commission and that it has not even been on the agenda for the College to bring the case before the CJEU. If this is true, the reasons are not apparent and one can only speculate about them. However, whatever the causes are for the Commission's caving in to Sweden on this matter, the effect has been rapid and widespread. Beside the refugee crises, there is almost no other question within environmental law where opposition in Member States against the "bureaucrats in Brussels" is so strong and widespread as that of the wolf issue. The symbolic effect of the Commission's non-action cannot therefore be overestimated, especially since both ENGOs and hunting and farming lobby groups are well organised across Europe. The signal effect throughout the Union was therefore almost immediate and clear: on controversial issues concerning species protection the DG Environment is not serious when it threatens legal action. As for the wolf question, the first infringement case against Sweden has been continuing for almost six years and it is safe to say that it will probably not survive for long. However, it is not easy to evaluate whether this attitude has permeated other areas of EU environmental law, even though there are worrying indicators of this. The Swedish wolf issue can accordingly serve as a background for a more general discussion on whether infringement proceedings are an effective means of enforcing environmental law within the Union.

4.2 Successful infringement proceedings

Before discussing the weaknesses of infringement proceedings as a means of enforcing EU environmental law in Member States it is necessary to show the strengths and possibilities inherent in the instrument. This can be illustrated by the case brought against Sweden for not having im-

plemented and enforced the updating requirement concerning existing installations in Article 5.1 in the IPPC Directive (2008/1).¹⁸ According to this provision, Member States must take the necessary steps to ensure that the competent authorities exercise control so that permits for such installations are reconsidered and, where appropriate, updated in order to ensure operational compliance with certain conditions in the directive, before the end of October 2007. This requirement was implemented by a loosely formulated provision in a regulation under the Environmental Code in 2004. Here the operators were obliged to inform the authorities in their 2005 environmental reports of how permits for installation met legal requirements. A similarly loosely formulated provision was introduced in the Environmental Code, where it states that the competent authority must take appropriate measures to ensure that existing installations work in accordance with the law. The proposal for these implementation measures was remitted to different authorities, organizations and institutions in 2004 and was – not surprisingly – met with strong criticism. Uppsala University pointed out the obvious, stating that the proposed regulation was not sufficient to ensure that all existing installations were reconsidered and the permits updated by 2007. But despite this opposition the regulation was passed by the end of 2004. It is hardly a secret that the Ministry of the Environment in this case was dominated by the Ministry of Enterprises, which did not want to impose any additional burdens on operators. Efforts were made by the Ministry of the Environment and SEPA to speed up reconsidering and updating efforts at regional and local level, but, at the end of the day, little happened. One of the reasons was that the Ministry of Finance was unwilling to allocate sufficient funds for the job to be done properly.

In 2005 the Commission put pressure on a number of Member States to effectively implement the requirements on existing installations covered by the IPPC Directive, one of them being Sweden. A report to the Commission in 2007 showed that – out of a total of 1,073 installations – Sweden still had 191 where permits had not been reconsidered and updated as appropriate. In 2009 the number was 73, reduced to 33 in early 2010 when a Reasoned Opinion was delivered from the Commission. Later that year the number was brought down to 23. Therefore, it came as no surprise when the Commission sued Sweden in 2010 for failing to implement Article 5.1 of the IPPC Directive. In March 2012 the CJEU

¹⁸ Today, Article 21 of the Industrial Emissions Directive (2010/75).

found in a short judgement that Sweden – in its not taking the necessary steps to see that the competent authorities had reconsidered and updated the permits for existing installations – was in breach of Article 5.1 of IPPC Directive (C-607/10).¹⁹

Despite that judgement work progressed slowly. In 2013 the Commission brought a new action, this time for fines. When the time limit according to Reasoned Opinion elapsed – in November 2012 – only two installations remained, albeit two large factories. Interestingly, Sweden argued in the case that what counted was effort, not results. The government also contended that the time to fulfil the CJEU judgment of 2010 was too short, especially taking into account that the permits were to be decided by the environmental courts in Sweden and that court proceedings were invariably slow.²⁰ The Commission countered by stating that the updating requirement was set to the end of 2007 and no later, and it was a national problem if Sweden chose to update IPPC permits in court. Consequently, the CJEU was not convinced and fines were imposed in late 2014 (C-243/13). By that time only one installation lacked an updated permit. The fines were set at a lump sum of €2,000,000 plus €4,000 per day until all permits were finally updated. The final total price tag for the daily fines amounted to €56,000, the remaining permit being finally updated and made effective in December 2014.

In my view, this example illustrates that infringement proceedings may well be a most effective instrument for enforcing EU law on the environment, especially when strong economic interests opposing the regulation are at stake. The speed in the updating procedures for IPPC installations in Sweden increased significantly as a clear result of pressure from the Commission. Furthermore, the signal effect within governmental offices was quite substantial and the impression that “we are best in class” is today stained with doubt. Even so, there are less happy consequences of this case within the Swedish administration, one being that the payment of the fines fell on the budget of the Ministry of the Environment. But this proof that life is unfair seems to be the general experience of the fights between different sectors within the governments of EU Member

¹⁹ The judgement is short – 30 paragraphs – and available in French and Swedish only.

²⁰ C-243/13, para 15, however, is available in French and Swedish only. The strange Swedish system for the issuing of IPPC permits is described in C-263/08 *Djurgården-Lilla Värtan*, where the CJEU states in para 37 that the environmental courts are “exercising administrative powers”.

States. Whether this can be considered to offer some form of consolation is, perhaps, debatable.

4.3 Deficiencies of the instrument 1: political decision-making

Having discussed the possibilities of infringement proceedings as a means of enforcing EU law on the environment, the drawbacks of the instrument will now be demonstrated. As described above, this is clearly illustrated by the Swedish wolf case.

First, one must not forget that the Commission's activities in its implementation efforts on controversial areas of law are based on political balancing. One also has to take into account that DG Environment is only a minor (and, as in any government a rather weak) part of a greater administrative body. Even though this directorate may act as a tough negotiator with Member States during infringement proceedings, the Commission can have a different and more politically sensitive attitude when adopting its final position. This is one of the factors that make infringement proceedings unreliable and unpredictable. Even though the environmental complaints procedure has been improved and clarified after interventions from the European Ombudsman,²¹ this air of uncertainty is repeatedly emphasized by Member States in different situations. For example, from a Swedish perspective it is difficult to understand why Sweden has been subject to the Commission's enforcement action on its lack of control over sewage plants, when so many more Member States have reported failure in the same implementation. The time issue is also problematic, as some communications in EU Pilot may be dormant for years before they are closed or forwarded to infringement cases. Personal ambition among civil servants at the Commission also seems to have a certain influence in the initial phases of communication, as well as differences in understanding the requirements of Article 288 TFEU. While some people are willing to risk their careers on the correct implementation of a certain definition in a directive, others have a far more relaxed attitude. Be that as it may, the clear impression that one gains when discussing this matter with governmental officials from different Member States is that it is impossible to understand when the Commission will take action, or why.

²¹ Krämer, L: *The environment in EU law*. Journal of European Environmental and Planning Law (JEEPL) 2009 p. 13, at part 4 and 6.

Moreover, it is a widespread opinion that the political balancing of the Commission is different when contrasted with other areas of EU law – such as competition and free trade – which creates an ambiguity within the system. Of obvious reasons, this cannot be proved without comprehensive studies of the Commission’s decision-making, but another reason for this general attitude may well be that in those areas of law the protected interests are usually represented by professional actors with legal and financial resources readily available and who can bring cases before the national courts. In addition, the national systems are often equipped with specially assigned authorities for the enforcement of EU law, sometimes acting with the vigour of true fundamentalists. To provide an example of the latter, the Swedish Competition Authority has claimed that when municipalities offer their citizens free access to Wi-Fi in open places, this may distort the market for telecommunication and thus be in breach of EU competition law. Not all local councils have the strength, skill or funds to challenge such ideas.²² On environmental matters, there are seldom such national watchdogs with the capacity to take legal action in court to enforce Union law directly. Instead, supervisory competence often rests at regional or even local level where conflicts of interests can be strong and enforcement weak. One can therefore safely presume that there is a clear ‘under-implementation’ in this area of law, compared with others. This is probably also one of the factors explaining why more than half of the infringement cases against Sweden are addressed to the Ministry of the Environment. My impression is that the situation is similar in most other Member States. Other explanatory factors for this may be that EU environmental law is an expansive and rather new area, which can also be seen from the high proportion of such cases in the CJEU. But even so, perhaps the main reason why there are so many infringement cases in this area can be identified as stemming from the reluctance of Member States to put extra administrative burdens on enterprises and

²² One such case was opened against the Swedish city Helsingborg two years ago after complaints from the providers of telecommunications (TeliaSonera, Telenor, Hi3G Access, Tele 2). A number of communications from the Competition Authority were made to the city, which, however, fought back on the grounds that they only served the public good in a democratic society. Finally, the Competition Authority closed the without further action in late 2015 (Konkurrensverket 2015-12-154; dnr 706/2014, see <https://oppna.helsingborg.se/oppna-allt/helsingborgs-fria-wifi-oppna-tradlosa-natverk-i-staden/> – however, only available in Swedish).

businesses, and that the unwillingness to effectively implement EU environmental law is part of that.

Against this backdrop, such political balancing and negotiation that has taken place concerning the Swedish wolf hunt is especially unfortunate. Certainly, the Commission played the political card and will now have to pay the price in a loss of credibility. This may be in line with a more general decrease of ambition on the environmental front from the Juncker Commission, but that remains to be seen. In any event, political decision-making is certainly something that weakens infringement proceedings as an enforcement instrument in environmental law. This development needs to be openly discussed in wider public circles.

4.4 Deficiencies of the instrument 2: circular decision-making

One of the critical points highlighted by the administrative courts when striking down on the 2015 licensed hunt was the fact that the authorities had never asked whether the decisions made were in harmony with overarching legal norms in EU law. Instead, both the CABs and SEPA argued that the hunt was legal because it was based on Swedish legislation and on statements made by Parliament on the issue. In this way decision-making became 'circular' within a closed system and merely reflected the national legislature's standpoint without critically analysing whether decisions were permitted under the Habitats Directive. The courts found this noteworthy and that it meant that SEPA had in fact failed to undertake a full review of decisions.

This kind of 'circular decision-making' is actually common within the administration, though its forms can differ. Typically, the government authorizes a national agency to issue guidance on a certain topic while leaving the decision-making competence to lower levels of administration. When such decisions are appealed to the national agency they are upheld so long as they are in accord with the guidance. Furthermore, this is not a Swedish peculiarity. It exists in many Member States in different varieties and it is certainly so within EU environmental law. Owing to its complexity and strong relationship to technical and natural scientific expert knowledge this area is full of different 'soft guidelines'. These can often be found in different Commission guidances or 'endorsed' documents and the process for their creation can be quite formalized. One such example is the Common Implementation Strategies (CIS) that are

developed under the Water Framework Directive (WFD).²³ CIS aim at reaching a common understanding and approach to the directive and results in different guidance documents, which are discussed and decided by the network of EU Water Directors. These directors formally have the status of technical advisers without any mandate from the Member States, though the CIS documents are widely used for guidance on the implementation of the WFD. It is also the reason why the 'normative function' of these documents has become controversial, especially since it might take a considerable time before the CJEU gets the opportunity of having a say on the matter. In academic writing it is even claimed that certain situations exist that can never be reviewed in court.²⁴ Even if this is not the case, the Commission clearly uses the CIS documents in its interpretation of the WFD, and it is not a far-fetched assumption that this understanding of the legal obligations has an impact on the Commission's willingness to institute legal actions against Member States in such matters.²⁵

A similar phenomenon occurs in the wolf example. It is claimed that the Swedish licensed hunts are based on Article 16.1.e of the Habitats Directive. When the CABs and SEPA decided on this matter they referred to two guidance documents that have been developed in this area. First, there is a Commission guidance on the strict protection of species under the Habitats Directive from 2007,²⁶ and second, a guideline for management of large carnivores from the network Large Carnivore Initiative in Europe (LCIE) from 2008.²⁷ As the Habitats Directive differs between species listed in Annex IV, which enjoy strict protection, and species listed in Annex V, which may be managed, for example by hunts, the legal basis for Swedish licensed hunts of wolves can be regarded as being

²³ http://ec.europa.eu/environment/water/water-framework/objectives/implementation_en.htm.

²⁴ See Josefsson, H: *Ecological Status as a Legal Construct – Determining Its Legal and Ecological Meaning*. 27 *Journal of Environmental Law* 231 (2015).

²⁵ As argued by Korkea-aho, E: *Watering Down the Court of Justice? The Dynamics between Network Implementation and Article 258 TFEU Litigation*. *European Law Journal* 2014, p. 649, see especially at p. 664 ff.

²⁶ Guidance Document on the Strict Protection of Animal Species of Community Interest under the Habitats Directive, European Commission (Brussels), final version, February 2007.

²⁷ Guidelines for Population Level Management Plans for Large Carnivores in Europe. A Large Carnivore Initiative for Europe report prepared for the European Commission. Ed. Linell & Salvatori & Boitani L. Final version July 2008.

weak. However, support for this standpoint can still be found in LCIE guidelines, which opens up the possibility for the management hunting of species listed under Annex IV, irrespective of whether or not the population has reached favourable conservation (FCS). The LCIE statement, of course, has repeatedly been highlighted by the Swedish government and administration.²⁸ However, even though these guidelines constitute 'best practices' on a general level in accord with the EU Commission, this, of course, cannot be said for everything written in the document.

Apparently, the Commission is not – at least not until now – of the same opinion, as it has gone further with infringement proceedings against Sweden.²⁹ The reason for the Commission's standpoint is probably that management hunts are not permitted under Article 16.1.e, as the wolf population in Scandinavia has not reached FCS levels. But clearly, the Commission agrees that such hunts are in line with the directive when the population has reached such a status, even though it is listed in Annex IV. This was illustrated in the communication with Latvia in 2002 concerning the management hunt of the lynx. Here, the Commission stated that since the lynx in that country had reached FCS and the population numbered 600 to 650 individuals, a hunt with a total bag of 50 animals per year could be regarded as a 'limited number' in accordance with Article 16.1.e. The letter concludes with the statement that while the final say on how to understand this provision in the Habitats Directive lay with the CJEU, the Commission would not take legal action against Latvia so long as it abided by what has been agreed on in accordance with the management plan for the lynx.³⁰

²⁸ LCIE 2008 at pages 28 and 31.

²⁹ Shortly before SEPA decided on a licensed hunt for 2011, the Commission issued a summarizing document, arguing that licensed hunting contravened the Habitats Directive and asked for a delay. Nevertheless, a week later the SEPA released its decision on the licensed hunt for 2011, which was explained to the Commission in a letter, a week after that, by the Swedish Ministry of the Environment. In that letter the Swedish minister highlighted a statement from the LCIE, where this body expressed its confidence in the effectiveness of the 2010 hunt, and also that "as conducted [the hunt] could have been justified under several derogation criteria" in Article 16 of the Habitats Directive. All references from this communication can be found in Darpö, J: *Brussels Advocates Swedish Grey Wolves. On the encounter between species protection according to Union law and the Swedish wolf policy*. SIEPS Policy Analysis 2011:8. at page 6.

³⁰ Commission on the Latvian management plan for the lynx, letter signed by Margot Wallström and Günter Verheugen, Brussels D(2002). More information about the case can be found in the Commission's Guidance 2007, at page 57f.

In my view, these examples illustrate another obvious disadvantage with infringement proceedings as an instrument for enforcing EU law. So long as Member States implement the legal obligations in accordance with the opinion of the Commission, they will not bring a case to the CJEU. As the Commission often uses different guidance documents and other 'soft instruments' of EU environmental law, this may in some situations divest the CJEU from having a say in the matter. The pressing need for all kinds of guidelines and technical documents for an effective implementation of EU environmental law is clear, but it is also crucial that the system allows for them to be scrutinized openly by the courts, both on national level and on EU level.

4.5 Deficiencies of the instrument 3: lacking in transparency

As mentioned above, the Commission has been criticized for being unpredictable in its doings in relation to infringement proceedings. This criticism is reinforced by the fact that all communications under Article 258 are kept secret from the public concerned, whether in EU Pilot or at a later stage. The reason why many of the communications in the wolf case are still accessible to the public is that the Swedish government – at least the Ministry of the Environment – thinks that the transparency principle enshrined in the constitution takes precedence in such situations over the secrecy prevailing within EU institutions. However, this is not the common position in other Member States where access to information on communications with the Commission on different matters is very restricted, or even non-existent. The basic position in other Member States, as well as within the institutions of the EU, seems to be that communications in infringement proceedings are diplomatic in nature and that the process would be disturbed if the public were to be allowed to have an insight into such matters.

It is interesting to note that this attitude of mystery-making is not shared in the similar proceedings of the European Economic Area (EEA). All communications between the EFTA Surveillance Authority (ESA) and the Parties to the EEA (Norway, Lichtenstein and Iceland) are open to the public and posted on the ESA website. One such example is the ongoing infringement proceeding against Norway over the implementation of the WFD. This case concerns the classification of water bodies as 'heavily modified' and the updating requirements in accordance with

Articles 4.1.a.iii, 4.3, 5, 11.3 and 11.5 WFD.³¹ For obvious reasons we have much to learn from this case, especially since the positions of the EFTA institutions commonly closely reflect those of the CJEU and other EU institutions. Unfortunately, Norway has chosen not to include the Habitats Directive in the EEA, which is why there is no such path to knowledge concerning the wolf issue. Still, the country is bound by the Bern Convention,³² which the Habitats Directive aims to implement in EU law. So basically, the provisions on strict protection for listed species are still the same in Norway as in Sweden. The explanation as to why the status for wolves is so different in the two countries cannot therefore be found in the legislation as such, but in its enforcement. While Sweden has the Commission and the CJEU to overlook its international obligations, the Bern Convention lacks an effective compliance mechanism. There is a Standing Committee under the Bern Conventions, but it works primarily as a diplomatic tool between the parties.³³ Thus no one effectively controls Norwegian wolf management and this is probably the main reason that there are 65 wolves in that country compared with 340 in Sweden (25 live in the border area).³⁴

It is difficult to understand such secrecy-making in the EU in relation to infringement proceedings. There is little reason why the communications at the EU Pilot stage and onwards should not be open to the public. One wonders why this attitude of openness has functioned so

³¹ Case No: 69544; Complaint against Norway concerning compliance with the Water Framework Directive 2000/60 regarding regulated water courses. Most of the communications are posted on the website of ESA; <http://www.eftasurv.int/press--publications/public-documents/>, the rest are available on the Norwegian Water Portal; www.vannportalen.no.

³² Convention on the Conservation of European Wildlife and Natural Habitats. Bern, Switzerland, 1979-09-19, CETS 104.

³³ This does not, however, prevent the Committee from sometimes taking a harder bite on issues concerning species protection; see, for example, the Recommendation No. 144 (2009) of the Standing Committee, adopted on 26 November 2009, on the wind park in Smøla (Norway) and other wind farm developments in Norway. <https://wcd.coe.int/ViewDoc.jsp?id=1560617&Site>.

³⁴ The figures are from the winter count 2015/16, see Wabakken, P & Svensson, L & Maartmann, E & Åkesson, M & Flagstad, Ø: Bestandsovervåking av ulv vinteren 2015-2016. Bestandsstatus for store rovdyr i Skandinavia 1-2016, at page 4. It can also be noted that Norway recently decided to allow for the culling of more than 70% of that population, see <https://www.theguardian.com/environment/2016/sep/16/norway-wolf-cull-government-wwf-friends-earth-environment-protest>.

well in EFTA but is considered to be unthinkable in the EU. The underlying philosophy seems to be bound up with old traditions, the starting point being that the public is an interfering factor in a system of smoothly-working diplomacy. Obviously, such an attitude is not valid when discussions between the Commission and a Member State have developed into a communication in EU Pilot and a subsequent infringement procedure. Quite the opposite; the system would be improved by a modern attitude towards transparency, where the public is allowed to scrutinize the decision-making of the Commission. This would probably promote both predictability and reliability, as the doings of the Commission would be left open to public control. The openness of the ESA is also mentioned as one of the reasons why that authority is considered to be more technical than political in its efforts in implementing the EEA. EU environmental law would certainly benefit from a similar attitude. Today's system leaves too much room for rumour and gossip, which serves no one.

4.6 Importance of Article 267 proceedings

Finally, a few words on the relationship between infringement proceedings and requests from national courts for preliminary rulings from the CJEU. Against the above-discussed disadvantages of Article 258 proceedings, I think it is obvious that it is crucial for the effectiveness of EU law that the public enjoys the option of legally challenging administrative decision-making concerning the regulated interests. It is similarly important that controversial issues in such appeal cases can be brought to the CJEU by way of requests for preliminary rulings in accordance with Article 267 TFEU. It is only through such mechanisms that it can be guaranteed that the final say in the matter lies with the CJEU and not in national notions of EU law, or in soft guidance from the Commission or other assigned bodies.

In discussing this issue it should perhaps be emphasized that the Aarhus Convention has its limits. As was argued in the *Appeals ban case*, Article 9.3 accepts 'administrative appeal' so long as it meets the criteria of being fair and effective in accordance with Article 9.4. Obviously, one can debate whether or not an authority such as SEPA meets those requirements. On the one hand, its independence in decision-making in individual cases is guaranteed in the Swedish constitution. On the other, in reality as demonstrated by the cases concerning the licensed hunts, the authority's decisions are 'circular', only reflecting what Parliament has

decided without exercising control via reliance upon EU law. However, there is no need here to analyse this question further, it suffices to point to the fact that in Europe there exist many kinds of administrative appeal bodies and tribunals in different areas of law. The procedural advantages can be many in comparison with appeals to ordinary courts. Such tribunals may be provided with expertise relevant to the specific area of law. The procedure can be designed to be simple and flexible – for example, communications can be presented in writing before the hearing and costs can be minimized. This trend is especially evident in the environmental area, which is characterized by its complexity and dependence on scientific expert knowledge about nature and technology. Several such appeal bodies or tribunals have been created in recent years, such as the Information Committees or Nature Appeals Boards. This is part of an international development in this area of law, where there is a strong trend towards specialized environmental courts and tribunals.³⁵

In the Member States of the EU many of these tribunals lie within the administration and the procedure is, in essence, one for administrative appeal.³⁶ In this context it is therefore decisive for the effectiveness of EU environmental law – where, as noted above, the protected interests are often not represented by actors with legal and financial muscle or state authorities with both the power and will to bring actions to court – that those appeal bodies are designed so as to meet the requirements of Article 267 TFEU. Here, we may study the case law of the CJEU, where some administrative appeal bodies have passed the test and others not. Requests for preliminary rulings were accepted from the Finnish Rural Business Appeals Board in C-9/97 and C-118/97, as was such a request from the Austrian Umweltsenat in C-205/08. In contrast, the Danish Telecommunications Appeals Board did not meet the criteria, as the CJEU pointed to the fact that its members may be removed by the minister and that the board acted in court as the counterpart to the complainant in subsequent judicial review proceedings. In addition, the secretariat of the board lay within the Danish Ministry of Business and Enterprise. Other administrative appeal bodies may be disqualified owing to the fact

³⁵ See Pring, G & Pring, C: *Environmental courts and tribunals*. UNEP 2016.

³⁶ For the difference between ‘judicial review’ and ‘administrative appeal’, see Darpö, J: *Effective Justice. Synthesis report of the study on the Implementation of Articles 9.3 and 9.4 of the Aarhus Convention in the Member States of the European Union*, Brussels 2013-10-11, available at http://ec.europa.eu/environment/aarhus/access_studies.htm.

that they do not have fixed members. Clearly, national authorities under the government cannot be regarded as courts or tribunals under Article 267, which was confirmed in the Swedish *Appeals ban case*. But as noted, separate appeal tribunals with sufficient independence and impartiality, and whose decisions are final in the administrative proceedings, may meet the requirements.

Thus, in my view, the principle of legal protection requires that the public concerned is able to go to a court or tribunal that meets the criteria in Article 267 to challenge administrative decision-making in the environmental area. Having met those criteria, such bodies may also meet the requirements of Article 9.3 of the Aarhus Convention in offering ‘administrative or judicial procedures’ for the public. They may even be regarded as being an “independent and impartial tribunal established by law” in accordance with Article 6 of the European Convention of Human Rights (ECHR), a fact which may further improve the environmental procedure. In such a system, subsequent judicial review proceedings in ordinary courts can be restricted to points of law in a written procedure. Through such developments, the effectiveness of the environmental procedure can be improved, which seems to be a common interest for all actors in environmental law. But at the end of the day, it also depends upon whether the national courts or tribunals make use of the option available to request the CJEU for a preliminary ruling on the implementation and enforcement of EU law. In this respect, the Nordic experiences of the mechanism are not very encouraging in relation to EU environmental law: Sweden and Finland have made perhaps 3-4 referrals each since 1995; Denmark: 0 since 1973; Iceland and Norway to the EFTA Court: 0 since 1994.³⁷

5. Concluding remarks

In this article, I have discussed the pros and cons of infringement proceedings as a legal instrument for the enforcement of EU environmental law. The conclusions cannot be regarded as very controversial:

- It is crucial to the integrity of the EU legal system that the Commission does not proceed further with infringement proceedings beyond

³⁷ The numbers mentioned by Krämer in his articles in this issue of JEEPL are higher, but they include criminal cases related to environmental law. My numbers relate only to administrative decision-making in environmental matters.

EU Pilot if it does not seriously intend to take the action all the way to the CJEU. The Reasoned Opinion should be regarded as a point of no return in this respect, given that the circumstances remain the same.

- It is similarly crucial that the Commission applies its enforcement efforts equally for different areas of EU law. If the public gains the impression that infringement proceedings are used strictly and with great vigour on some areas of law – for example, on competition and trade – but loosely, arbitrarily and inconsistent on areas concerning the environment or general health, it will lose confidence in the rule of law as a governing principle within the Union.
- It is also necessary that both infringement proceedings and references for preliminary rulings from the CJEU are used widely in order to avoid ‘circular decision-making’, not least on areas of environmental law, which are highly dependent upon scientific expert knowledge and thus dominated by ‘soft guidelines’ of all kinds.
- Transparency would improve the general public’s involvement in and understanding of EU law and would be an effective means of controlling how the Commission performs its implementation task.

Finally, some general remarks should be made on the crucial role of the CJEU on areas which are politically highly controversial. Since 2009 and the beginning of the Swedish wolf policy, I have been of the opinion that there are strong reasons for the Commission to take the case all the way to the CJEU. However, as shown above, argument from a legal scholar is one thing and everyday political reality is another, with the two sometimes diverging greatly. This is not a peculiarity in this particular case, but can be illustrated generally by the published figures on infringement proceedings. According to the statistics, the Commission receives about 700 complaints a year and deals with some 3,000 ongoing cases concerning complaints and infringement proceedings. Of this total, one-third relate to the environmental sector.³⁸ In 2009 about 77 per cent of all complaints were closed before the first formal step in an infringement proceeding; another 12 per cent were closed before the Reasoned Opinion; and a further seven per cent (approximately) before a ruling from the CJEU. If I understand the figures correctly this means that out of the 23 per cent of all complaints where a Letter of Formal Notice was sent to the

³⁸ 26th and 27th annual report on implementation of EU law (2008 and 2009), compared with Krämer: *The environment complaint in EU law*. JEEPL 2009 p. 13, at p. 31 f.

Member State concerned, only four per cent reached court. Another not very promising figure concerns the time factor. In the *Finnish wolf case* (C-342/05) proceedings began with a Letter of Formal Notice in April 2001. The Reasoned Opinion came more than two years later in June 2002, and the Commission's referral to the Court of Justice in September 2005. In court, the Advocate General delivered her opinion in November 2006, with judgment delivered in June 2007. In all, between the Letter of Formal Notice and the judgment, more than six years had elapsed.³⁹

In sum, one can easily find many factors that speak against infringement proceedings as an effective means of promoting EU environmental law. But this can also be said of the system with preliminary rulings, as the national courts – also at the highest level – are quite reluctant to make such requests, notably in the wolf issue. A case concerning the licensed hunt similar to the Swedish is at the moment being dealt with in the Finnish HFD, which in my understanding will not ask the CJEU for a preliminary ruling on whether or not the hunt is in line with EU law. This summer, the Swedish HFD granted leave to appeal for the licensed hunt of 2016 and it is to be hoped that that court will make such a reference. This is important on a more general level, and not only for reasons of legal certainty. No matter how appalling it may seem to be for some politicians, to give the CJEU an opportunity to have a say on the matter – irrespective of whether this happens through Article 258 or Article 267 proceedings – might in the long run even be desirable from a political standpoint. The Swedish and Finnish governments are clearly of the opinion that the wolf hunt is consistent with EU law while the European Commission has officially formed the opposite opinion. Politicians are also under intense pressure from those of the opinion – regardless of how representative it is – that SEPA and the Swedish politicians should stand up for traditional living and enterprise in rural areas. In this situation, it is desirable that the CJEU makes a determination once and for all. In closing, I do in a way agree with those who say that the wolf issue should not be decided in Brussels. The day-to-day management issues should, of course, be decided at Member State level. But ultimately, the legal requirements for derogation from strict protection under Union law need to be decided in Luxembourg.

³⁹ Still, this is not an extreme example. The Swedish case on water-scooters (C-142/05 *Mickelson & Roos*) took over four years in the Court of Justice (the referral was made in March 2005 and the judgment delivered in June 2009)!