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Strictly Protected European Wolf Meets Swedish Hunter with Licence to Kill**

1 Introduction

The Swedish wolf policy is highly controversial. On the one hand, the Scandinavian wolf population does not have a favourable conservation status. Between 1960 and 1990, the wolf population in Sweden was close to extinction, although it has increased significantly since then, due partly to three individual wolves that came from Russia/Finland in the early 1980s and partly to decisions to legally protect wolves in Sweden in 1966 and Norway in 1972. More recently, two or three additional eastern wolves have immigrated successfully. In 2000, the total Scandinavian wolf population was about 100 wolves and in late winter 2010 between 202 and 241 individuals.¹ However, the conservation status depends on both numbers and genetic diversity. A group of scientists – *Large Carnivore Initiative for Europe* (LCIE) – has concluded that the population is built on an «extremely narrow genetic base and inbreeding coefficients are very high».² A Swedish state commission declared in April 2011 that

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¹ SOU 2011: 37 Rovdjurens bevarandestatus [The carnivores' conservation status], p. 38.

² Position statement from the LCIE in the 2010 and 2011 Swedish wolf hunts, version 2, 3 February 2011 (hereafter: LCIE position statement), p. 1. The LCIE members «bring experience from the fields of ecological and human-dimensions research, wildlife management, hands-on conservation» (www.lcie.org).

«the Scandinavian wolf population cannot become viable unless the degree of inbreeding is decreased».³

On the other hand, there is strong pressure from Swedish hunting interest groups to reduce the wolf population, not least because of attacks on livestock and dogs and because of competition for certain game species, such as moose. In some regions of Sweden, particularly in the counties of Dalarna and Värmland and in the vast reindeer herding areas in north and mid-west Sweden, aversion to the wolf as a species and, perhaps even more, to the Swedish wolf policy administration, is very strong among some inhabitants. The Swedish wolf policy administration is located in the capital, Stockholm, where the only wolves are those that are safely encaged at Skansen Zoo. The illegal killing of wolves is assumed to be prevalent in some areas.⁴ In October 2009, a new policy on wolf management was adopted by the Swedish Parliament in order to manage the conflict of interests. In brief, the policy is:⁵

- to limit the total Swedish wolf population to 210 individuals⁶ and allow 20 rejuvenations per year,
- to introduce not more than 20 individuals with eastern origin to strengthen the genetic status of the wolf population, firstly through natural immigration and secondly through introduction organised by the Swedish Environmental Protection Agency (SEPA), starting in 2010 and to be completed in 2014,
- to regulate the size of the wolf population by allowing management hunting complemented with protective hunting,⁷ and

³ SOU 2011: 37, p. 45.

⁴ It is of course impossible to determine the exact extent of illegal hunting. According to a scientific report published in 2010, of 51 dead wolves with radio transmitters found during the period 1999–2010, 44 % were considered to have been killed by illegal hunting; Sand., H., et al. 2010. *Den Skandinaviska Vargen en sammanställning av kunskapsläget 1998–2010 från det skandinaviska vargforskningsprojektet SKANDULV*, Grimsö forskningsstation, SLU. Rapport till Direktoratet för Naturförvaltning, Trondheim, Norge, p. 17.

⁵ Prop. 2008/09:210, En ny rovdjurspolitik [A new management policy for large carnivores], p. 31 ff.

⁶ This limit has been revoked, at least temporary, see below.

⁷ Management hunting [förvaltningsjakt] is carried out by many licensed hunters in order to regulate the size of the wolf population in most of the wolf territories in Sweden. Permission to conduct protective hunting is determined on a case by case basis, e.g. to kill a wolf that is known to cause serious damage in a local area.

- in principle, to limit the range of the wolf population to areas outside the yearround reindeer grazing land.⁸

The first management hunt was conducted in January 2010, based on a decision in 2009 where SEPA decided to kill in total 27 wolves within certain selected counties (in fact, 28 were killed).⁹ The second management hunt was carried out in January and February 2011.¹⁰ 19 wolves were shot (the decision allowed for 20). The decision was executed despite a request from the EU Commissioner (DG 11) to await the Commission's examination of the 2010 hunt.

Although the conflict of interests, which at times has been quite heated, can be a delicate matter for the Swedish political establishment to handle, the Swedish policy on wolf management cannot of course contravene the EU Habitats Directive.¹¹ The wolf is listed in Annex IV to the directive as a species in need of strict protection, and the killing of wolves is thus as a general rule prohibited.¹² However, hunting is lawful if several specific conditions in Article 16.1 are satisfied. This means, firstly, that the Swedish authorities must ensure that the conditions are *in fact* complied with, e.g. when granting permission to carry out protective or management hunting in individual cases. Secondly, Swedish *law* must, as stated by the European Court of Justice (ECJ)¹³ in several cases, ensure «the full application of the directive in a sufficiently clear and precise manner».¹⁴ Consequently, even if hunting decisions in practice would comply with the directive, valid Swedish hunting provisions must clearly and fully reflect the prohibition in Article 12.1 and the exemptions in Article 16.1.

This paper discusses the relationship between the Habitats Directive, in particular Article 16.1, and the Swedish hunting legislation. In spite

⁸ Single wolves should be permitted within these areas only if they do not settle there and establish a preserve.

⁹ Beslut om licensjakt efter varg 2010 [Decision on management hunting with licence 2010] Naturvårdsverket [SEPA] 2009-12-17, Dnr 411-7484-09 Nv. www.naturvardsverket.se/upload/04_arbete_med_naturvard/varg/varg2009/N-licensjakt-varg-2010.pdf.

¹⁰ Beslut om licensjakt efter varg 2011 [Decision on management hunting with licence 2011]. Naturvårdsverket, 2010-12-17, NV-03454-10, www.naturvardsverket.se/upload/04_arbete_med_naturvard/varg/Varg2010/N-licensjakt-2011-varg.pdf.

¹¹ Council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereafter: Habitats Directive).

¹² Habitats Directive, Article 12.1 (a).

¹³ After the Lisbon treaty 2007: Court of Justice of the European Union.

¹⁴ See e.g. C-339/87, *Commission v. the Netherlands*, REG 1990 s. I-00851.

of a statement on the Swedish government's home page that «the Habitats Directive is fully implemented in Swedish legislation»,¹⁵ I will argue that Swedish legislation permits the killing of wolves in certain situations where the directive does not. I will also examine whether the decisions to allow management hunting comply with the directive.

The policy and the decisions have been questioned for some time by the EU Commission, resulting in a «Letter of formal notice» in January 2011,¹⁶ followed by a «Reasoned opinion» in June 2011, which is the last stage before bringing the case to the ECJ.¹⁷ Being under pressure from the Commission, the Swedish government decided on August 16, 2011 to revoke (at least temporarily) the limit of 210 wolves in Sweden. It also decided not to permit management hunting during the winter 2011/12. SEPA was demanded to investigate the preconditions for protective hunting in areas where wolves are frequent, including the need to change existing hunting legislation.¹⁸

This paper does not include information on the Swedish wolf case after the governmental decision of August 16. It is not yet clear whether the SEPA proposals will interfere with the requirements in the Habitats Directive, or how the EU Commission will react to the changed governmental policy. Whatever happens, the case has already raised several legal questions of considerable importance for EU and the Member States.

2 Does Article 16.1(e) of the Habitats Directive permit hunting?

2.1 Strict interpretation

The decisions by SEPA to permit the management hunting of wolves that took place in 2010 and 2011 were based on Article 16.1(e) of the Habi-

¹⁵ www.regeringen.se/sb/d/12669/a/138794.

¹⁶ Formell underrättelse [Formal Notice] angående omständigheterna kring Sveriges vargpolitik och implementering av denna genom licensjakter på varg, överträdelenummer 2010/4200 (hereafter: Formal notice).

¹⁷ Motiverat yttrande [Reasoned Opinion] till följd av landets underlåtenhet att uppfylla sina skyldigheter enligt artiklarna 12 och 16 i direktiv 92/43/EEG om bevarande av livsmiljöer samt vilda djur och växter. Överträdelse nummer 2010/4200 (hereafter: Reasoned opinion).

¹⁸ Regeringsbeslut [Governmental decision] 2011-08-16, M2011/2803/Nm.

tats Directive. Before discussing whether the exemption permits hunting, it is necessary to emphasize that Article 12.1 of the directive prohibits the killing of strictly protected species and that, consequently, ECJ case law indicates a *restrictive* interpretation of all exemptions from Article 16.1. In *Commission v. UK* 2005, the Court declares that «Article 16 of the Habitats Directive defines in a precise manner the circumstances in which the Member States may derogate from Articles 12 ..., so that Article 16 must be interpreted restrictively».¹⁹ In *Commission v. Finland* 2007, a case concerning protective wolf hunting, the ECJ describes Article 16.1 as a provision «that provides for exceptional arrangements which must be interpreted strictly».²⁰

Article 9.1 of the Birds Directive is also interpreted strictly.²¹ A comparison of the protection systems in the two directives, however, suggests that Article 16.1 of the Habitats Directive should be interpreted even more strictly than Article 9.1 of the Birds Directive. Article 9 of the Birds Directive permits derogation from the general protection of *all* bird species in Article 5, regardless of whether they are in need of strict protection or not. In contrast, Article 16.1 of the Habitats Directive applies to only a limited number of animal species listed in Annex IV (a), all of which are of community interest and in need of «strict protection». While the protection interest is generally very strong in the Habitats Directive, it varies from case to case in the application of Article 9 of the Birds Directive, leading to a wider power to derogate from the provisions as regards some bird species.

2.2 Diverging language versions

Article 16.1(e) of the Habitats Directive empowers Member States

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.

¹⁹ C-6/04, *Commission v. UK*, REG 2005 s. I-09017, para 111.

²⁰ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 25.

²¹ See further Guide to Sustainable Hunting under the Birds Directive, European Commission, 2008, p. 41 ff.

The Swedish government has assumed that the term «taking» includes killing animals by hunting and the Commission has not objected to this understanding of the word. This is not surprising, as a guidance document issued by the Commission assumes that hunting is a form of «taking»,²² although the document does not specifically define «taking».

The matter is not that simple. The terminology in Article 16.1(e) varies in the different language versions of the Habitats Directive. Some of those are explored here. Apart from in the English version of the directive, the word «taking» is correspondingly used in the French («la prise»), German («die Entnahme») and Spanish («la toma») versions. However, the Swedish language version of the directive uses the term «insamling»,²³ like the Danish «indsamling» (collection). In the Italian language version, the expression «la cattura» is used, which may be translated as «the capture». While the term «taking» may, but not necessarily does, include hunting with the purpose to kill the individual, this is not the meaning of either «collection» or «capture». It is worth noting that the general prohibition in Article 12.1(a) differentiates between «capture» and «killing». The prohibition includes «all forms of deliberate capture or killing» of the species in the wild.²⁴ «Killing» is correctly reflected in the Swedish language version of Article 12.1(a) of the directive («döda»).

Several decisions of the ECJ deal with the issue of diverging language versions. The position taken by the ECJ is that no language has general priority: «community legislation is drafted in several languages and the different language versions are equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions».²⁵ And, as the ECJ states in several cases «the need for a uniform interpretation of those versions requires, in the case of divergence between them, that the provision in question be interpreted by reference to the purpose and general scheme of the rules of which it forms part».²⁶

²² Latvian Lynx management plan in Guidance document on strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC, Environment Directorate- General of the European Commission, February 2007, p. 55 f. (hereafter Commission guidance document).

²³ This is also the term used in the corresponding section 23 c of the Swedish Hunting Regulations, which applies to «licensed hunting of bear, wolf, wolverine and lynx».

²⁴ Article 5 of the Birds Directive includes the same distinction.

²⁵ C-283/81, *Cilfit*, *Rec.* s. 3415, para 18.

²⁶ C-72/95, *Kraaijeweld*, *REG* 1996 s. I-05403, para 28. See also C-30/77, *Regina v*

2.3 Is hunting a form of taking?

When comparing the different language versions, the first matter to consider is whether the legal meaning of «taking» in, e.g., the English version of Article 16.1(e) of the Habitats Directive includes hunting with the purpose to kill the animal. Although current usage of the term «taking» encompasses a wide range of activities and, in certain situations, includes hunting, the pertinent question is if the term in this particular legal context refers to behaviour other than hunting. This question is especially relevant because while the prohibition in Article 12.1(a) applies to «capture or killing» (of fauna species), the power to derogate applies to «taking or keeping» (of fauna or flora species).

An important objective of the Habitats Directive is to implement the 1979 Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention), to which both Sweden and EU are parties. It is relevant to examine whether the Bern Convention can be useful in the interpretation of Article 16.1(e) of the Habitats Directive. The Article is equivalent to Article 9.1, last indent, of the Bern Convention, which provides for exemptions «to permit, under strictly supervised conditions, on a selective basis and to a limited extent, the taking, keeping or other judicious exploitation of certain wild animals and plants in small numbers». It cannot be concluded from the language of Article 9.1 if «taking» includes hunting. Nevertheless, the Bern Convention Standing Committee has stated that the phrase «taking, keeping or other judicious exploitation» in Article 9.1 includes «for instance, hunting».²⁷ The Standing Committee appears to regard hunting as a form of «taking» and not «exploitation», which instead «refers to any activity other than the taking of the individuals of a species, such as the taking of eggs ...».²⁸

Another parallel provision to Article 16.1(e) of the Habitats Directive is Article 9.1(c) of the Birds Directive. This provision permits Member States to derogate from the general prohibition in Article 5, which requires Member States to establish a general system of protection for

Bouchereau, REG 1977 s. 1999, para 14 and C-449/93, *Rockfon*, REG 1995 s. I-04291, para 28.

²⁷ Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, T-PSV (2011) 2, p. 4.

²⁸ Op. cit., p. 5.

all birds, including prohibiting «deliberate killing or capture by any method».²⁹ Pursuant to Article 9.1(c), Member States may however

permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

The exemption in Article 9.1(c) does not refer to the term «killing», while the general prohibition in Article 5 refers to both «killing» and «capture». The question then is whether, by choosing the term «taking» in Article 16.1(e) of the Habitats Directive, the EU intended to expand the scope of the provision to also include hunting with the purpose to kill. This is possible but not obvious. The Birds Directive applies only to birds, whereas Article 16.1 of the Habitats Directive applies to both fauna and flora. «Capture» (Article 9.1(c) of the Birds Directive) is not an adequate term to describe the collection of orchids or other plants, while the term «taking» includes both collecting plants and capturing animals. «Taking» could therefore be explained as a term chosen to cover certain activities related to both fauna and flora, without necessarily including hunting.³⁰

Finally, the term «taking» is also used in Article 14 of the Habitats Directive. This provision applies to management measures for species which are not strictly protected (the Swedish wolf population is thus not included in Annex V). According to Article 14.2, fourth indent, such management measures may include «application, when specimens are taken, of hunting and fishing rules which take account of the conservation of such populations». It is clear that the term «taking» in Article 14 includes hunting (and fishing).

To conclude, a purely linguistic analysis of the corresponding provisions of the Bern Convention and the Birds Directive does not indicate clearly that the word «taking» should be given a more narrow meaning in the directives compared to current usage. In Article 14 of the Habitats Directive, hunting is obviously a form of «taking». Although Article 16.1(e) applies to strictly protected species, this is not reason enough to presume that «taking» should be given a different meaning here than in Article 14.

²⁹ This Article corresponds to the principle prohibition in Article 9 of the Habitats Directive.

³⁰ This is also observed in Christiernsson, A; *Skyddet av biologisk mångfald vid jakt, En studie om rättens förhållande till komplexa och dynamiska ekosystem tillämpat på uttag av viltarter*, Luleå tekniska universitet 2008: 53, p. 123 (hereafter: Christiernsson).

In the different language versions of Article 16.1(e), «taking», «la prise», «die Entnahme» and «la toma» includes hunting, in contrast to «insamling», «indsamling» and «la cattura». Consequently, the provision must, according to ECJ case law, be interpreted «by reference to the purpose and general scheme of the rules of which it forms part».

2.4 Purpose and general scheme of the rules of which it forms part

The parallel provision in Article 9.1(c) of the Birds Directive is a natural starting point when looking for consistency in the «general scheme». In its case law, the ECJ has so far not considered the killing of birds as a form of «capture». However, in a preliminary ruling from 2003 – *Ligue pour la protection des oiseaux and Others* – the ECJ held that hunting is a form of «other judicial use».³¹ This expression is not used in Article 16.1(e) of the Habitats Directive, and a very strict interpretation of the provision would lead to the conclusion that hunting thus was excluded. However, an alternative argument is that the expression «other judicial use» is substituted by the somewhat more specific term «taking», which consequently would also include hunting.

A more useful approach is to compare Article 16.1(e) with the other exemptions in the same Article. These all refer to specific purposes: «protecting wild fauna and flora» (Article 16.1(a)), to «prevent serious damage on ... property» (Article 16.1(b)), «in the interests of public health and public safety» etc. (Article 16.1(c)), and «research and education» etc. (Article 16.1(d)). The exemption in Article 16.1(e) does not specify any purpose. Thus, if hunting is a form of «taking», it is lawful to permit hunting of strictly protected species for any reason whatsoever. This result may seem harsh, especially from a restrictive interpretation perspective. However, collecting and capturing also involve taking individuals of strictly protected species out from the wild. The local ecological impact is the same; whether the intention is to kill the species individual or not is, from this perspective, irrelevant. Still, if the individual wolf is moved to another location in the wild, e.g. in order to improve genetic diversity in this area, the overall ecological effects are significantly different from hunting.

³¹ C-182/02, *Ligue pour la protection des oiseaux and Others*, 2003 s. I-12105, para. 11.

Furthermore, since Article 16.1(e) does not specify any particular purpose, the function of the provision seems to be to include different kinds of behaviour for which exemptions from the prohibition in Article 12 are permissible, provided however that several additional conditions apply (besides the general conditions in the Article). While the conditions must obviously be interpreted strictly, the same does not necessarily apply to the words that describe the different kinds of behaviour. This is probably how the Commission understands Article 16.1(e). In its guidance document, the Commission does not even touch upon the meaning of «taking or keeping», but is both careful and restrictive when defining the expressions «limited numbers», «under strictly supervised conditions», «on a selective basis» and «to a limited extent».³² And, as mentioned above, the Commission assumes in its guidance document that exemption can be granted for hunting under Article 16.1(e) in the example given of a Latvian Lynx management plan.³³

The Bern Convention Standing Committee's interpretation of the parallel provision in Article 9.1 of the Bern Convention is also of interest. This convention Article includes the same exemptions as Article 16.1(a) to (e) of the Habitats Directive, for which certain purposes are specified. However, in addition, in the last indent, Article 9.1 of the Convention permits derogation for «taking, keeping or other judicious exploitation», without specifying any purpose, but with several additional conditions. According to the Standing Committee, a Contracting Party may, in the application of Article 9.1, last indent, decide upon a derogation «for any reason which it seems to be valid (for instance, hunting, recreation, etc.) and without any reason having to be given». Moreover, the Standing Committee «is not required to check the merits of the purpose of the exception, but to ensure that the other conditions are satisfied».³⁴ Finally, Article 14 and Annex V of the Habitats Directive, as explained above, obviously include hunting (and fishing) as a form of taking. It is noteworthy that the corresponding Swedish term «insamling» (like the Danish «indsamling») in this context also refers to the application of hunting

³² Guide to Sustainable Hunting under the Birds Directive, European Commission, 2008, p. 56 f.

³³ Op. cit., p. 57 f.

³⁴ Draft Revised Resolution No. 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention, T-PSV (2011) 2, p. 4.

(and fishing) rules. This indicates that a similar understanding should be given to Article 16.1(e).

To conclude, it is reasonable in view of the additional conditions, which are interpreted strictly, to read Article 16.1(e) of the Habitats Directive (like Article 9.1, last indent, of the Bern Convention) as a rule whose purpose is to expand the scope of the permitted types of behaviour, including hunting, while the additional conditions serve to safeguard the protective objectives of the directive. Furthermore, a comparison with Article 14 of the Habitats Directive indicates that the choice of the term «insamling» in the Swedish and Danish versions of the directive is incorrect because Article 14 clearly refers to, e.g., hunting. Presumably, the same mistake was made when formulating Article 16.1(e).

However, the fact that Article 16.1(e) should be interpreted to include hunting as a form of taking does not lead to the conclusion that Swedish *management* hunting conducted in 2010 and 2011 was lawful pursuant to the exemption.

3 Swedish management hunting and the Habitats Directive

The management hunts in 2010 and 2011 were carried out pursuant to decisions to take out a maximum number of 27 and 20 wolves inhabiting certain counties. The decisions applied to all persons with hunting rights within these areas, provided he or she had registered for the hunt. They permitted the killing of any individual wolf, regardless of sex, age etc. The hunts were subject to certain conditions regarding methods to be used and reporting etc.³⁵

The Swedish government assumed that the management hunting decisions did not violate the exemption in Article 16.1(e). It is noteworthy that Annex V of the Habitats Directive lists species whose taking in the wild and exploitation may be subject to «management measures», including hunting. However, these provisions do not apply to the Swedish case as wolves on Swedish territory are not listed in Annex V. The question, therefore, is whether the preconditions in Article 16.1(e) allow for a spe-

³⁵ Regarding the management hunt 2011, see Naturvårdsverket [SEPA], Beslut 2010-12-17, NV- 03454-10.

cial, additional form of management hunting of a species that is strictly protected according to Annex IV of the directive.

In its Formal Notice and Reasoned Opinion, the EU Commission is critical of the Swedish position on several grounds. The Swedish government and the Commission assess the facts differently and therefore conclude differently on whether or not the conditions in Article 16.1(e) are complied with. This dispute relates to the question of evidence and the burden of proving that the conditions are satisfied. It is obvious from ECJ case law that uncertainty is not in favour of the Swedish government; the ECJ states in *Commission v. Finland 2007* that Article 16.1 «provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation».³⁶ As a consequence of the obligation to strictly implement Article 16, the Swedish government must provide strong evidence of compliance with each condition of the derogation.

I will now discuss the Swedish management hunting in relation to the relevant conditions in Article 16.1.³⁷

3.1 «No satisfactory alternative»

The Swedish government has argued that the aim of the management hunt was to increase long term acceptance among the rural population living in wolf inhabited areas; generally for wolves as a species and, more specifically, for a future introduction of new individuals in order to improve the wolf genetic status. Social acceptance is not mentioned in Article 16.1 of the Habitats Directive as a ground for derogating from strict protection. However, according to the Commission guidance document, Article 16.1 can be applied for that reason.³⁸

The Commission and the Swedish government discuss in the correspondence whether social acceptance could be improved by measures other than management hunting. The Swedish government has argued that alternative measures have been taken, such as information projects, subsidies for fencing to stop large carnivores attacking grazing animals,

³⁶ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para. 25.

³⁷ I will not analyse if the hunt was performed «under strictly supervised conditions». There are different opinions on how the hunt in 2010 was performed and controlled.

³⁸ Commission guidance document, p. 57.

and the involvement of hunters and other interest groups in the decision making process. The government further argues that these measures have not helped to improve acceptance while the random management hunt has.³⁹ The Commission suggests that some of these measures are new and that the effects on social acceptance are not yet known. The Commission disagrees with the standpoint that the random management hunt has improved acceptance for the wolf.⁴⁰ The Swedish government has referred to a scientific report as important proof of

improved acceptance after the hunt. The report is based on 58 interviews, most of them with individual hunters involved in the 2010 hunt. A few civil servants and some interest groups (representing hunters, rural population, farmers, large carnivore conservation and nature conservation) were also interviewed. The purpose of the study was to identify opinions and experiences related to the preparation and performance of the hunt in 2010 (preparation, organisation etc. of the hunt),⁴¹ but not to investigate attitudes to the wolf as a species. Thus, it cannot be concluded from the report that acceptance for the wolf or the wolf policy has improved among the Swedish population in the rural areas of, e.g. Värmland and Dalarna. Furthermore, the Commission refers in its Reasoned Opinion to a pending, not yet published report, including a survey directed to 3000 persons. The Commission concludes from the report that «the hunting has not changed the views on the wolf population size in wolf inhabited counties or in Sweden overall».⁴²

I will not elaborate on the opposing views of the Commission and the Swedish government on the issue of social acceptance here. Different conclusions have been drawn from the material submitted in the case. There are apparently remaining uncertainties. This does not favour the Swedish government, which has the burden of proof.

³⁹ Svar på formell underrättelse från kommissionen angående omständigheterna kring Sveriges vargpolitik och implementering av denna genom licensjakt på varg [Sweden's response to Formal Notice], ärendenummer 2010/4200, p. 8 ff.

⁴⁰ Reasoned Opinion, para 3.15.

⁴¹ Sjölander-Lindqvist A, Karlsson M, Cinque S; *Att jaga varg. En studie av 2010 års licensjakt i Sverige*, Cefos rapport 2010: 2, Gothenburg University, p. 3.

⁴² Reasoned Opinion, para 3.17. The report was conducted by the SOM Institute at the University of Gothenburg.

3.2 «Not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range»

The current conservation status of the Swedish wolf population is unquestionably unfavourable. However, exemptions can be accepted in this situation if, as the ECJ puts it in *Commission v. Finland* 2007:

it is *duly established* that they are not such as to *worsen* the unfavourable conservation status of those populations or to *prevent their restoration* at a favourable conservation status [italics added].⁴³

At the time of the hunts, the trend for the wolf population in Finland was deemed to be positive. The number of breeding pairs had increased from 11 to 16 in the period from 2001 to 2004 and there had been an undisputed increase during these years of the total number of wolves in Finland from between 110 and 130 specimens to between 185 and 200 specimens. The ECJ therefore concluded that Finland had not violated the conservation status criteria.⁴⁴

However, due to the lack of genetic diversity, the situation for the wolf population in Sweden is significantly different from the situation in Finland. While there is a continuous genetic inflow of wolves from Russia to Finland, the Swedish wolf population is isolated in the southern parts of the country and the possibilities are limited for eastern wolf individuals to pass through the reindeer herding areas in Finland and Sweden.⁴⁵ According to LCIE, the «[p]otential effects of inbreeding depressions have already been documented in the population».⁴⁶ It is in this connection relevant that the second main part of the Swedish wolf policy – to introduce wolf individuals with eastern origin to strengthen the genetic status of the wolf population – was not being carried out at the time when the decision on the management hunt was made and is still not being carried out (August 2011).⁴⁷ While accepting the Swedish management hunt in principle, LCIE states: «Our position is also strongly conditional on

⁴³ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 29.

⁴⁴ Op. cit., para 39.

⁴⁵ Reasoned Opinion, para 21.

⁴⁶ LCIE position statement, p. 1.

⁴⁷ Two individuals with eastern origin already habiting in Sweden have been moved to other parts of Sweden, where they however have not stayed; www.naturvardsverket.se/sv/Start/Naturvard/Jakt-rovdjur-och-vilt/Rovdjur/Flytt-av-genetiskt-vardefulla-vargar/.

the fact that plans for genetic reinforcement of the population are carried out.»⁴⁸ There was no such plan. Furthermore, there are doubts, e.g. raised by the Commission, whether the moving of wolf individuals will be successful in practice, taking into account, e.g. the risk of spreading diseases, etc.⁴⁹

The Commission is in several respects critical of how the Swedish wolf policy relates to the requirement of «favourable conservation status».⁵⁰ It considers that the management hunt constitutes a risk that both the total number of wolves and the number of breeding pairs may be reduced.⁵¹ It also believes that the size of the targeted population (210 wolves) is «too small to prevent the further deterioration of its genetic composition».⁵² The Commission stresses that a limitation to 210 individuals «adversely affects the population dynamics. A small population loses its genetic variation through inbreeding faster than a large population».⁵³ The situation is worsened as relocations of genetically valuable wolves are few and because only some of those individuals become part of the breeding population. Thus, the

setting of a ceiling [210 wolves] has caused a condition which causes higher rate of loss of genetic variation and hence further deterioration of the genetic status which is considered as the main obstacle towards favourable conservation status of the population.⁵⁴

Although the Swedish government has decided, at least temporarily,⁵⁵ to eliminate the ceiling of 210 wolves, the question of whether a member state is allowed according to the Habitats Directive to set such ceilings is of general interest. It is worth noting that there is no explicit provision in the Directive on the setting of a ceiling, not even a temporary ceiling, indicating the maximum population of a strictly protected species. Although Member States have considerable freedom of discretion in how they implement the objectives of EU directives, the relevant objective here is to achieve a «favorable conservation status». A ceiling may be seen

⁴⁸ LCIE position statement, p. 4.

⁴⁹ Formal Notice, p. 8 f.

⁵⁰ See further Reasoned Opinion, para 3.24–3.37.

⁵¹ Op. cit., para 3.24.

⁵² Op. cit., para 3.25.

⁵³ Op. cit., para 3.31.

⁵⁴ Op. cit., para 3.32.

⁵⁵ The Swedish hunters have not accepted an elimination of the ceiling.

as part of a social acceptance policy, but not as a tool in the development of the present fragile Swedish wolf population towards a favorable conservation status.

The role of LCIE as a consulted group of scientists should be commented upon. As regards the ecological assessment of whether the management hunt was *detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range*, it must be noted that the LCIE has accepted the Swedish management hunt in principle (with several conditions). LCIE takes the following position on the effect of the hunt on the wolf population:

Although the Swedish managers are seeking to temporarily halt the growth of the population (and therefore its development towards favourable conservation status), we believe that this is unlikely to seriously jeopardise the potential for the population to grow towards a future state that satisfies the desire for long term viability and favourable conservation status once this temporary freeze is lifted.⁵⁶

I am not competent to question the LCIE ecological assessment per se, but I nevertheless have doubts concerning the legal relevance of the LCIE position. Nothing in the LCIE five page-position statement indicates that the LCIE has based its opinions on a strict interpretation of the exemption in Article 16.1 of the Habitats Directive and the supplementing ECJ case law. This is noteworthy because the specific legal conditions are decisive to the question of whether the taking of strictly protected species is permissible and, consequently, for the ecological assessment in the case. Recognising the LCIE as a highly competent body, its assessment could even be misleading. The important question is not if the hunting is «*unlikely to seriously jeopardise*» (italics added) a future growth of the wolf population (see citation above). In line with *Commission v. Finland 2007*, the pertinent question is rather whether SEPA – at the time when the decisions on the 2010 and 2011 hunts were made – could show that it was «duly established» that the derogations were not such as to «worsen the unfavourable conservation status» of the population or to «prevent their restoration to a favourable conservation status»⁵⁷ – despite the planned management hunt, anticipated legal protective hunting, anticipated illegal hunting, other mortality and anticipated inbreeding. It

⁵⁶ LCIE position statement, p. 3.

⁵⁷ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 29.

is also relevant to ask if a strict application does not require a successful (!) introduction of new individuals *before* management hunting is conducted. In the Swedish case, not even a plan for such reinforcement of the population had been prepared.⁵⁸

I turn now to the conflict of interest between wolves and reindeer grazing. According to Article 16.1 of the Habitats Directive, hunting must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status *in their natural range*. One element of the Swedish wolf policy is to limit the range of the wolf populations to areas outside the very large, year-round reindeer grazing territories.⁵⁹ The exception for year-round reindeer herding areas is not based on ecological scientific research indicating that this land is not part of the wolf population's natural range. Rather, the reasons for the exception are the increased costs of reindeer herding caused by the wolves and other conflicts with Sami culture. The Swedish government refers to its obligations to comply with certain international conventions and other documents that protect the rights of indigenous people:⁶⁰ the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and especially recommendation no. 23,⁶¹ Article 27 of the 1966 International Covenant on Civil and Political Rights,⁶² Article 20 of the 2007 United Nations Declaration on the Rights of Indigenous

⁵⁸ In the Reasoned Opinion, para 3.43, the Commission deems the translocations of wolves to be «unsatisfactory and incoherent because they are uncertain and have not materialised. Translocations could therefore not be invoked in the context of justifying the license hunt of wolves in Sweden».

⁵⁹ The policy leads to further concentration of wolves in Värmland and Dalarna where the conflict is already very heated.

⁶⁰ See Svar på formell underrättelse från kommissionen angående omständigheterna kring Sveriges vargpolitik och implementering av denna genom licensjakt på varg [Sweden's response to Formal Notice], ärendenummer 2010/4200, p. 23 ff.

⁶¹ General Recommendation No. 23: Indigenous Peoples, 1997-08-18, item 5: «The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources ...».

⁶² «In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language» (Article 27).

People⁶³ and Articles 5 and 15 of the 1995 Council of Europe Framework Convention for the Protection of National Minorities.⁶⁴ Without analysing the material in detail, all of the international treaties to which the government refers, in very general terms protect or support the cultural and other interests of the Sami population, in contrast to the precise conditions in Article 16.1 of the Habitats Directive, dealing with the specific issue of derogation from protection of strictly protected species (which in turn is an interest protected in different international conventions). It is hard to see how the Swedish argumentation would influence the interpretation of Article 16.1.

Although the conflict between wolves and reindeer herding is probably impossible to avoid in practice, the year-round grazing land is obviously part of the «natural range» of the Scandinavian wolf population. Protective hunting must therefore comply with the conditions in the Habitats Directive and, quite rightly, Swedish hunting legislation does not contain any exemptions for the year-round reindeer herding areas. Obviously, there is a contradiction between law and policy. While Swedish law provides that exemptions from general prohibitions shall be interpreted narrowly, the Swedish wolf policy allows for hunting in general on wolves that remain on reindeer grazing land. There is a clear risk that the express policy message may influence the application of the law.⁶⁵ A legal decision on protective hunting by the County Board in Dalarna may serve to illustrate this attitude:

The County Board considers the large carnivores policy guidelines to be clear and that also genetically important wolves should not remain on reindeer grazing land and, because of that, protective hunting may be con-

⁶³ «Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities» (Article 20).

⁶⁴ «The Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage» (Article 5.1). «The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them» (Article 15).

⁶⁵ As the Commission puts it: «Wolves do not appear to be authorised in the year-round grazing grounds»; Reasoned Opinion, para 3.38.

ducted where preserves are established without analysing the origin of the wolves.⁶⁶

To summarise, the Swedish government has not proved that the decisions on the 2010 and 2011 hunts comply with the condition that the hunts shall not «worsen» the conservation status of the wolf population,⁶⁷ or that the Swedish wolf policy promotes a favourable conservation status for the wolves in their natural range.

3.3 «Selective basis»

Was the taking of wolves permitted on a *selective* basis? On recommendation from a group of scientific experts on wolves, the decision regarding the 2010 hunt exempted one territory, while the decision regarding the 2011 hunt exempted two territories. These territories were known to host immigrating individuals with first generation descendants. Other wolf territories were deemed to differ very little with respect to genetic value, so for those territories, which were located within five counties, no further selection was made.⁶⁸ Any wolf individual could be killed regardless of sex, age, size, behaviour etc. The decisions did not, for instance, prevent the shooting of alpha wolves, or descendants from wolves with eastern origin that may have moved to non-exempted territories. The decisions did not distinguish between different wolf packs within the «free» territories.⁶⁹ Consequently, the hunts were random in the five regions.

In *Commission v. Finland 2007*, the ECJ accepted a system of hunting licenses subject to a maximum regional limit of specimens which may be killed. However, the Finnish wolf hunting policy was quite different to the Swedish policy. Hunting was conducted according to Article 16.1(b) of the Habitats Directive, in order to prevent «serious damage». The regional limit was «only the framework within which the game manage-

⁶⁶ «Länsstyrelsen tolkar dock att rovdjurspolitikens riktlinjer är tydliga och att även genetiskt viktiga vargar inte ska etablera sig inom renkötselområdet och därför kan skyddsjakt bli aktuellt i de fall där etablering sker utan att vargarnas ursprung har analyserats»; Ansökan om skyddsjakt efter varg inom Idre nya sameby och Ruvhten sijte, Länsstyrelsens i Dalarnas län beslut 2010-12-10, dnr 218-6974-10 och 218-7121-10, p. 6.

⁶⁷ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 29.

⁶⁸ Naturvårdsverket 2009-12-17 Dnr 411-7484-09 Nv, p. 14 and Naturvårdsverket 2010-12-17, NV-03454-10, p. 17.

⁶⁹ Formal Notice, p. 10.

ment districts may issue hunting permits where, in addition, the conditions in Article 16(1) of the Habitats Directive are fulfilled».⁷⁰ So, while the Finnish hunts were eventually permitted on a case by case basis, the Swedish decisions allowed for hunting generally in certain regions.

To conclude, the Swedish management hunting decisions cannot be deemed to be «selective» in the regions where hunting was permitted, as required by a strict application of the exemption in Article 16.1(e),⁷¹ which also stipulates a limitation to *certain specimens*.

3.4 «Limited extent» and «certain specimens in limited numbers»

The Swedish hunting regulations related to the exemptions in Article 16.1(e) in the Habitats Directive do not include the formulations «limited extent» and «certain specimens in limited numbers». With regard to the importance of these criteria in the Directive, the Swedish transposition must be regarded as insufficient. The following analyse whether the two decisions on management hunting comply with the two criteria in Article 16.1(e) of the Directive.

The decision regarding the 2010 hunt permitted the killing of 27 wolves. According to statistics published by the Swedish government, the 2010 hunting bag represented between 12.9 % and 14.2 % of the total wolf population at the time of the decision (between 90 and 209 wolf individuals).⁷² The government has indicated that the management hunt was the most common cause of wolf mortality during the first half of 2010.⁷³ The 2011 hunting bag of 20 individuals constituted between 9.6 % and 10.5 % of the total population.⁷⁴

This issue must also be viewed from the perspective of total wolf mortality.⁷⁵ The Swedish government reported 62 dead wolves in 2010, between 29.7 % and 32.6 % of the total wolf population. In *Commission*

⁷⁰ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 45.

⁷¹ This is also the position taken by the Commission in Reasoned Opinion, para 3.55–3.58.

⁷² The percentage is higher if counting also the 28th wolf being illegally killed during the 2010 hunt.

⁷³ Reasoned Opinion, para 3.62.

⁷⁴ Op. cit.

⁷⁵ See also Christiernsson, p. 122.

v. Finland 2005, the ECJ applied the corresponding provision in Article 9.1(c) of the Birds Directive. This includes the phrase «small numbers», which

should be understood to mean any sample of less than 1 % of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in order of 1 % for those species which may be hunted.⁷⁶

The figures speak for themselves. The killing of some 14 % (2010) and 10 % (2011) of the total wolf population cannot be seen as taking to a «limited extent ... certain specimens ... in limited numbers», irrespective of the actual development of the wolf population after the decisions. Also in relation to the total mortality perspective and in view of ECJ case law, the taking of 27 individuals in 2010 (far exceeding 1 % of total mortality) does not comply with the legal criteria in Article 16.1(e).

3.5 Conclusions

To summarise, the assessment above indicates that the Swedish decisions to allow management hunting in 2010 and 2011 do not comply with the conditions in Article 16.1(e) of the Habitats Directive. This conclusion is not based on an ecological assessment per se, but on a strict interpretation of the legal conditions in Article 16.1(e) and on the position adopted by the ECJ that the Article «impose[s] on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation».⁷⁷ If the Commission decides to bring the case to the ECJ and, contrary to my expectations, the Court should find that the Swedish extensive and non-selective hunts comply fully with Article 16.1(e), the consequence will be that this provision in fact provides for a management hunting of strictly protected species that is not particularly different from the management hunting of not strictly protected species listed in Annex V of the directive.

⁷⁶ C-344/03, *Commission v. Finland 2005*, REG 2005 s. I-11033, para 53. The Swedish government has argued that the case does not apply to the Swedish wolf hunt because large mammals generally have a low adult mortality rate while small animals and birds have a higher rate. The Commission claims there is no great difference in this sense as regards large mammals and large birds; see Reasoned Opinion, para 3.61 and 3.63.

⁷⁷ C-342/05, *Commission v. Finland*, REG 2007 s. I-04713, para 25.

4 Protective hunting in emergency situations

Protective hunting in accordance with the derogations in Article 16.1 of the Habitats Directive is permitted after a decision by an authority. Certain provisions in the Swedish Hunting Regulations relate to Article 16.1, requiring a permit in each case. However, protective hunting in Sweden is also in some situations permitted without prior consent of an authority. One such situation, which for many years has been the subject of separate and specific regulation in the Swedish hunting legislation, is the controversial situation where a carnivore attacks or is about to attack a tame animal.

In the case reported in *NJA 2004 s. 786*, a hunter was convicted of «serious illegal hunting» [«grovt jaktbrott»] after having killed a wolf which was approaching the hunter's cows and calves.⁷⁸ The Hunting Regulations permitted the killing of wolves if the hunting was performed in «immediate connection» with a previous attack. In this case, the wolf had killed a neighbour's sheep⁷⁹ five hundred meters away from where the wolf was shot. The time period between the attack and the shot was ten minutes. The Supreme Court held that the wolf was not killed in «immediate connection» with the previous attack.⁸⁰

The case was much debated and led to a relaxation of the regulatory provision.⁸¹ Today, section 28 of the Hunting Regulations entitles the owner or person in charge of a tame animal⁸² to kill a bear, wolf, wolverine or lynx

- if the carnivore «attacks and hurts a tame animal or if it is obvious that such an attack is immediately imminent»,
- if «there is reasonable ground to fear an attack on the tame animal and the killing is carried out in direct connection with a situation where the carnivore has attacked and hurt a tame animal», or

⁷⁸ The maximum punishment for «serious illegal hunting» [«grovt jaktbrott»] is four years of imprisonment compared to one year of imprisonment for «illegal hunting» [«jaktbrott»], sections 43 and 44 of the Swedish Hunting Act (1987: 259).

⁷⁹ Over a period of a few days, the wolf had killed several sheep on the island.

⁸⁰ The hunter was acquitted in the two lower court instances.

⁸¹ Separate legislation (substituting section 28 of the Hunting Regulations) was adopted for this specific situation; Regulations (2007: 127) with special provisions on protective measures in connection with attacks from carnivores. In 2009, the situation was again regulated in section 28 of the Hunting Regulations (amendment 2009: 310).

⁸² Also other persons are under certain conditions entitled to kill the carnivore; see Hunting Regulations, section 28.

- if the carnivore is found «within fenced area aimed at taking care of the tame animal and there is reasonable ground to fear an attack there».

The killing is lawful only if it is «impossible to scare the carnivore away or in another appropriate way interrupt or avert the attack». Despite this and the other conditions, section 28 of the Hunting Regulations permits a considerable degree of protective hunting. It applies to the protection of all tame animals, including not only sheep and cows but also e.g. dogs in connection with hunting in regions where the risk of conflict with, e.g., wolves or bears is considerable. Hunting may also be conducted in areas where other persons have hunting rights.⁸³

In relation to the Habitats Directive, section 28 of the Hunting Regulations constitutes a national derogation from the prohibition in Article 12 against killing strictly protected species.⁸⁴ The corresponding derogation in the directive is Article 16.1(b): «to prevent serious damage, in particular to ... livestock ... and other types of property» (e.g. dogs). The directive does not include any additional exemptions related to immediate attacks. Killing a wolf in connection with an immediate attack on a human being should be considered an exemption (emergency) pursuant to general legal principles, but section 28 of the Hunting Regulations aims at protecting *property*. The ECJ accentuates in *Commission v. UK*:

Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned, so that any derogation incompatible with the directive would infringe both the prohibitions set out in Articles 12 and 13 and the rule that derogations may be granted in accordance with Article 16.⁸⁵

In other words, section 28 of the Hunting Regulations must clearly and fully comply with all conditions in Article 16.1.

⁸³ Hunting Regulations, section 28 b.

⁸⁴ In this case, wolves, bears and lynx; the wolverine is not listed in Annex IV of the directive.

⁸⁵ C-6/04, *Commission v. UK*, REG 2005 s. I-09017, para 111.

Nevertheless, the Swedish provision deviates in several respects from the derogation.⁸⁶ Article 16.1(b) of the Habitats Directive applies only to «serious» damage to property. The «aim is not to prevent the threat of minor damage».⁸⁷ Although the term «serious» is not precise, section 28 of the Hunting Regulations makes no distinction at all between different degrees of damage, and thus is not a sufficient transposition of the directive. Furthermore, the derogations in Article 16.1 apply only if there is «no satisfactory alternative». Section 28 of the Hunting Regulations permits protective hunting if it is «impossible to scare the carnivore away or in another appropriate way interrupt or avert the attack». This covers alternative solutions available in connection with the immediate attack but not preventive actions, e.g. using electric fences to protect sheep or avoiding hunting with dogs in certain areas. It is thus possible that the Swedish provisions partly set aside the derogation in Article 16.1; instead of taking long term, and perhaps costly preventive measures, owners or persons in charge of tame animals could elect to make use of the «right» to kill the carnivore in connection with possible attacks.

Finally, the derogations in Article 16.1 of the Habitats Directive do not apply if the hunting is «detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range». The Swedish Hunting Regulations require the Swedish Protection Agency to «continuously consider» if the protective killing according to section 28 has this effect on e.g. the wolf population. If so, the Agency shall «at once report to the government».⁸⁸ The idea is probably that the government shall revise the Hunting Regulations if necessary. This legal solution may seem practical but it is inadequate as a form of legal transposition ensuring «the full application of the directive in a sufficiently clear and precise manner».⁸⁹ Article 16.1 relates directly to the *hunting conduct* and Swedish law, as it stands today, even permits the shooting of the last individual of a wolf population on Swedish territory.

⁸⁶ In *NJA 2004 s. 786*, the Supreme Court wrote that «it could in itself be questioned whether the Swedish provision complies with the Habitats Directive», i.e. Article 16.1(b). However, the court did not examine the issue as it was not directly relevant to the case.

⁸⁷ Case 247/85, *Commission v. Belgium*, REG 1987 s. 3029, para 56.

⁸⁸ Hunting regulations, section 28 c.

⁸⁹ See e.g. C-339/87, *Commission v. the Netherlands*, REG 1990 s. I-00851.

5 Final comment

The findings in this paper indicate that Swedish wolf policy is in several respects inconsistent with the prohibition in Article 12 and the derogations that are permitted by Article 16.1 of the Habitats Directive. Even if the term «taking» in Article 16.1(e) should be interpreted so as to include hunting with the purpose to kill the animal, the Swedish decisions regarding the management hunts in 2010 and 2011 do not comply with a strict application of the derogations in the Article. Section 23 c of the Swedish Hunting Regulations is not a correct a transposition of Article 16.1(e) of the Habitats Directive as it lacks certain crucial criteria. Furthermore, section 28 of the Swedish Hunting Regulations, which provides for special protective hunting in connection with immediate attacks on tame animals, is also incorrectly transposed into Swedish law from Article 16.1 of the directive. It gives the owner or person in charge of a tame animal the right to kill strictly protected carnivore in situations where the directive does not.

This paper has examined shortcomings in the Swedish hunting law and its application in Sweden.⁹⁰ The aim was not to discuss the most appropriate legal solution. It is important to further examine a more precise formulation of the Habitats Directive. At present, there is a rather wide gap between the right to perform management hunting on species listed in Annex V of the directive and the derogation for hunting strictly protected species in Article 16.1(e). The legal listing is crucial, but complex reality may call for other, more flexible solutions based on adaptive wild-life planning. It is also relevant to consider whether protective hunting in connection with immediate attacks should be regulated as a separate, specific situation in the directive. New legal solutions may however not compromise the overall aim to achieve a favourable conservation status for strictly protected species.

⁹⁰ Several but not all of the deficiencies are observed in the Commission's Formal Notice and Reasoned Opinion.

