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Swedish licensed hunting of the wolf under the Habitats Directive

Does Swedish hunting law live up to the requirements of EU biodiversity law?

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Abstract

This thesis analyses the Swedish legislation relating to the licensed hunting of the wolf, under the lens of the Habitats Directive. This analysis is underpinned by the Environmental Law Method in order to internalize ecological knowledge in the legal discourse, since environmental law should be constructed on the full understanding of its object, that is, the environment. In this sense, two main questions are addressed in this thesis: (i) what does Favourable Conservation Status (FCS) imply, as required by the Habitats Directive, and whether the Swedish wolf can be considered to have reached it, and, depending on the answer, (ii) if Swedish licensed hunting of the wolf is in accordance with the requirements of strict protection and derogations regime of the Habitats Directive. The main findings relate, on one hand, to a deficient integration of scientific evidence in the hunting policies and regulations that implement hierarchically superior environmental norms, stemming from the Habitats Directive and the Swedish Environmental Code, and also to an apparent intrusion of political reasonings in the legal deliberations of the national courts, which aren't necessarily aligned with the jurisprudence of the CJEU.

Abbreviations

BD: Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

BC: Convention on the conservation of European wildlife and natural habitats.

CAB: County Administrative Board.

CBD: Convention on Biological Diversity.

CJEU: Court of Justice of the European Union.

ELM: Environmental Law Method.

ENGO: Environmental Non-Governmental Organization.

EU: European Union.

FCS: Favourable Conservation Status.

FRP: Favourable Reference Population.

FRV: Favourable Reference Value.

HD: Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

HFD: Swedish Supreme Administrative Court (Högsta Förvaltningsdomstolen).

IUCN: International Union for Conservation of Nature

LCIE: Large Carnivore Initiative for Europe

MS: Member State

MVP: Minimum Viable Population

NGO: Non-Governmental Organization

SEPA: Swedish Environmental Protection Agency

TFEU: Treaty on the Functioning of the European Union.

1 Introduction

1.1 Background

Wolves are among the most controversial species when it comes to biodiversity conservation. Both for their symbolic connotations – rural versus urban, utilitarian versus egalitarian values, “us” and “them”¹ - and for their economic impact on several sectors, such as extensive farming or hunting practices, these creatures have been persecuted up to its extinction in several regions.² The system of beliefs, identity and sociological factors intertwined in the wolf conflict goes far beyond the short-term political agendas of the bodies entrusted with wolf management.³ Thus, the wolf issue has grown in the collective imaginary, on the one hand, as a symbol of rewilding and survival, and on the other, as the redoubt of a traditional, once ubiquitous ruralism, both views implicating different stakeholders with highly diverging views that clash without a proper forum to establish a meaningful dialogue.

This has usually ended up with grim consequences for wolf conservation: in Sweden, for example, wolves were declared extinct in the 1960s.⁴ A timid recolonization, led by five individuals from Finland and Russia, took place only twenty years later,⁵ and the species is currently red-listed as highly threatened.⁶ In fact, the wolf has a long way ahead to achieve the numbers necessary to ensure its long-term ecological viability, as hunting and poaching, together with inbreeding depression and an absence of proper wildlife corridors, are keeping the Scandinavian wolf at a genetic bottleneck.⁷ In this sense, the current number of wolves inhabiting Sweden is of approximately 395 individuals,⁸ whose accordance with the concept of Favourable Conservation Status (FCS) is questionable. Favourable Conservation Status is a legal-ecological concept required under the Habitats Directive (HD)⁹, which Sweden is dutybound by. However, Sweden has bestowed FCS to the wolf by considering it as a part of a larger meta-

¹ Darpö 2016, p. 3.

² Randi 2011, p. 99–100.

³ Lin et al. 2021, p. 61.

⁴ Darpö 2011, p. 1.

⁵ Liberg et al. 2005, p. 17.

⁶ Artdatabanken, “Eurasiatisk skogsvarg” (2020).

<<https://artfakta.se/naturvard/taxon/Canis%20lupus%20lupus-100024>>.

⁷ Vilà et al. 2003, p. 91.

⁸ Naturvårdsverket, “Jakt på varg” (2022). <<https://www.naturvardsverket.se/amnesomraden/jakt-och-vilt/jakt-pa-rovdjur/jakt-pa-varg>>.

⁹ Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L206/7.

population,¹⁰ although this flexible interpretation might be at odds with the requirements of the Habitats Directive.

Indeed, the EU Commission has manifested its disagreement on FCS being granted to the Swedish wolf. Moreover, the Commission started an infringement procedure against Sweden in January 2011 on the basis that their licensed hunting policies were in breach of the Habitat Directive's derogation system.¹¹ However, the case was never brought to the Court of Justice of the European Union (CJEU), mainly because of the role that national courts played in assessing licensed hunting under the lens of the HD.¹² Moreover, Sweden stopped licensed hunting in 2019 since the population was decreasing, so no further action was taken by the Commission, although the case remains open. However, licensed hunting was resumed in 2021 and 27 and 28 wolves were killed in the 2021 and 2022 hunting season, respectively.¹³ Additionally, the Swedish Parliament (Riksdag) has decided to lower the wolf population to half of its current size, to 170–270 individuals.¹⁴ Against this backdrop, doubts on the validity of Swedish hunting policies in the light of EU law shall be addressed.

1.2 Purpose and research questions

This thesis aims to analyse Sweden's policies on licensed hunting under the Habitat's Directive, mainly through the Directive's stated objective of biodiversity conservation as established in article 2, and through the strict derogation system provided in article 16.1(e), which Sweden is using to justify licensed hunting.¹⁵ Special attention will be given to the concept of Favourable Conservation Status as established in the Directive, as it has raised some questions partly due to its hybrid nature as a legal concept based on ecological notions.¹⁶ While Sweden claims that the wolf is at FCS,¹⁷ the scientific

¹⁰ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 11.

¹¹ EC, "June infringements package: key decisions" (18 June 2015) <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5162>.

¹² EP, Committee on Petitions 2019, p. 4.

¹³ Naturvårdsverket, "Jakt på varg" (2022). <<https://www.naturvardsverket.se/amnesomraden/jakt-och-vilt/jakt-pa-rovdjur/jakt-pa-varg>>.

¹⁴ Sveriges Riksdag, "Naturvård och biologisk mångfald" (18 May 2022). <https://www.riksdagen.se/sv/dokument-lagar/arende/betankande/naturvard-och-biologisk-mangfald_H901MJU24>.

¹⁵ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*, p. 1.

¹⁶ Epstein 2016, p. 221.

¹⁷ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 7.

community includes it in the Swedish Red List¹⁸. Additionally, in 2015 the EU Commission affirmed, backed by further scientific research, that the Swedish wolf hadn't reached FCS.¹⁹ At that moment, there were approximately 415 wolves in Sweden, while, as of 2022, the numbers are around 395.²⁰ The conclusion on whether the Swedish wolf has FCS is relevant to assess the stringency of the requirements set under article 16.1(e), and thus, important in order to assess Sweden's compliance with the Habitats Directive.

Therefore, the research questions for this thesis are:

Are Swedish policies on wolf licensed hunting in compliance with the Habitats Directive?

- 1- What does FCS imply and does the Swedish wolf have FCS?
- 2- Is wolf licensed hunting in Sweden allowed under the Habitats Directive?

1.3 Method

As this thesis evaluates the compliance of a policy, i.e., the Swedish wolf licensed hunting, with a legal document, i.e., the Habitats Directive, I will employ the legal method²¹ to systematize the relevant EU and Swedish legal landscape to assess the legality of the policy in question. However, and despite the hermeneutical character of doctrinal legal research, environmental law is usually informed by natural sciences and this thesis is not an exception. Therefore, certain concepts such as that of Favourable Conservation Status, which are instrumental to the understanding of the Habitats Directive relevant provisions, will need to be informed by the natural sciences.

This thesis will also employ the environmental law methodology (ELM) coined by Staffan Westerlund in order to maintain legal discussions inside ecological boundaries, since this is the basis of ELM: that sustainable development discussions must remain within ecological sustainability, since planetary boundaries are the precondition for social and economic sustainability.²² Indeed, environmental law must be *adapted to*, and not the other way around, the realm of scientific evidence, because no discussion on social or

¹⁸ Art databanken, "Eurasiatisk skogsvarg" (2020).

<<https://artfakta.se/naturvard/taxon/Canis%20lupus%20lupus-100024>>.

¹⁹ EC, "June infringements package: key decisions" (18 June 2015)

<https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_5162>.

²⁰ Naturvårdsverket, "Varg, population Skandinavien" (2021). <<https://www.naturvardsverket.se/data-och-statistik/vilt/varg-population-skandinavien>>.

²¹ M. Smits 2017.

²² Westerlund 2007.

economic viability may take place outside of the enduring laws of nature without being unsustainable, which shall be the main objective of environmental law. Therefore, since here, ecological sustainability is understood as biodiversity conservation, specifically of wolves, empirical evidence stemming from natural sciences will set the limits for what can be regarded appropriate under an environmental legal lens.

While legal orders change and evolve, we haven't always constructed these in accordance with natural limits, and in this sense, the wolf issue is a good example. Large carnivore conservation is embedded in a mixture of social, economic, legal, and scientific elements that blur the main underlying, immutable character of what Westerlund called "Naturebas", that is, the laws of nature.²³ Thus, this thesis aims to internalise natural sciences as long as they provide the empirical evidence on whose limits one may build a specific legal discourse. Therefore, this thesis will import Westerlund's concepts on *organic environmental law*, *compatibility* and *environment rationality* in order to draw conclusions on the appropriateness of Swedish law under EU law. If the object of environmental law, and in this case, of biodiversity conservation, originates in natural sciences, then, the input of the latter is extremely valuable. However, for this, natural disciplines such as conservation biology need to be capable of establishing a meaningful dialogue with environmental law disciplines. This requires *compatible* information. If *compatibility* is achieved, *organic environmental law* is feasible since law may be "applied with full understanding of the realities concerning the object",²⁴ that is, in this case, the wolf species and its ecological reality.

However, organic environmental law can't just mean a full understanding of the biological reality underlying the legal conflict of licensed hunting, if it doesn't know how to achieve the purpose of wolf conservation. For this, something more is required, that is, environmental rationality: this means that "the environmental impact of whatever is discussed sets the perspective",²⁵ which here is the conservation of the wolf. Now, the legal solution enacted to address this ecological problem (wolf protection) will be environmentally rational if it is "constructed and designed for effectiveness", in this case, with respect to the legal conservation of the species.²⁶ Lastly, this thesis will address

²³ Westerlund 2007, p. 628., quoted in Stenseke 2021, p. 84.

²⁴ Westerlund 2007, p. 57 and 640.

²⁵ Ibid., p. 10.

²⁶ Ibid.

Swedish *legal operationalization* in relation to wolf licensed hunting as referring to what the ELM describes in the following: “how human conduct shall be adapted to the environment and environmental goals”.²⁷

The legal materials used in this thesis have varying degrees of bindingness. While primary European law is on top of the hierarchy, followed by secondary law and, guiding the interpretation of these, the rulings of the CJEU, other sources used here aren't to be seen as establishing the ultimate meaning of the law. This goes for the different documents issued by the EU Commission, be them Guidelines, Guidance Documents or letters directed to specific Member States, whose value is merely interpretative and may be or may not be corroborated by the ultimate interpreter of EU law, that is, the CJEU. The rulings of the CJEU are accompanied by an Opinion of the Advocate General, who gives an impartial and independent opinion which, even though is usually followed by the court,²⁸ it doesn't necessarily have to be this way, cases like the *Skydda Skogen* case²⁹ proving it. However, whenever an opinion of the Advocate General is included in this thesis, unless otherwise indicated, it means that that line of thought was also followed by the Court. The jurisprudence of the Birds Directive (BD)³⁰ will also be utilized because it has already been established that it can guide the interpretation of the Habitats Directive when such analogies are considered appropriate to the case in question.³¹

Since the author is not Swedish, a lot of sources cited in this thesis are secondary due to the language barrier, mostly from legal scholars Gustav Stenseke in his doctoral thesis “Entangled law”³², in relation to Swedish jurisprudence and legislation, and Jan Darpö and Yaffa Epstein, in relation to the communications between Sweden and the EU Commission.³³

1.4 Limitations

The situation of the Swedish wolf is influenced by several elements apart from licensed hunting, which in turn can affect the conditions on which licensed hunting can be

²⁷ *Ibid.*, p. 522.

²⁸ Arrebola et al. 2016, p. 1–2 and 38–39.

²⁹ C-473/19 and C-474/19 *Föreningen Skydda Skogen*.

³⁰ Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds OJ L20/7.

³¹ Epstein and Chapron 2018, p. 80. Moreover, the Supreme Administrative Court in Sweden has already relied on jurisprudence of the BD to rule on wolves licensed hunting (e.g., HFD 2016 ref. 89 p. 34).

³² Stenseke 2021.

³³ Darpö and Epstein 2014; Darpö and Epstein 2015; Darpö 2016.

deployed without breaching EU law, mainly because they can affect the Swedish wolf's FCS. However, these won't be addressed in this thesis. Thus, this thesis will not address Sweden's compliance with the Habitats Directive in the light of the obligations imposed by the wolf's inclusion in Annex II, which implies obligations relating to the protection of wolves' natural habitats, and same goes for protective hunting, which aims at targeting specific individuals in relation to an attack or damage to property, or for other reasons of overriding public interest.³⁴ Licensed hunting, on the other hand, aims to merely reduce the density of populations, in order to manage the populations.³⁵

Large carnivores are highly migratory, and usually require cross-border cooperation for an effective management of its population. However, cross-border cooperation of the Scandinavian wolf population between Norway and Sweden won't be addressed either, and same goes for the connectivity between Swedish and Finnish wolf populations, which has to do with Sami culture³⁶ and will only be mentioned in chapter 3.2 for its impact on FCS.

Finally, the Habitats Directive has been chosen due to its direct relevance for Sweden in terms of licensed hunting and EU environmental law, but the author acknowledges the existence of several other international treaties relevant for biodiversity conservation that, even if indirectly, touch upon this topic, such as the Convention on Biological Diversity (CBD) or the Convention on the conservation of migratory species of wild animals.³⁷

1.5 Structure

This thesis will be structured as an hourglass: it starts with the broader EU political framework of the EU Biodiversity Strategy 2030 and legal framework of the Habitats Directive, to then move on to the specifics of Swedish legislation regarding licensed hunting, and finishes with an overall reflection of the appropriateness of sectoral regulations, such as hunting laws, to implement European environmental law. The concept of FCS permeates all the chapters of this thesis due to its core importance for

³⁴ Naturvårdsverket, "Skydds jakt" (2022). <<https://www.naturvardsverket.se/amnesomraden/jakt-och-vilt/skydds jakt/>>.

³⁵ Stenseke 2021, p. 297.

³⁶ Lin et al. 2021, p. 61.

³⁷ Convention on Biological Diversity (adopted 5 June 1992, in force 29 December 1993) UNTS 1760 (p. 79); and Convention on the conservation of migratory species of wild animals (adopted 23 June 1979, in force 1 November 1983) UNTS 1651.

biodiversity conservation law in the EU, so that, even if it will be thoroughly assessed only in Chapter 3.2, it will be present from the beginning to the end of this thesis.

The EU Biodiversity Strategy will be assessed in what is deemed potentially relevant for the environmental issue at hand, that is, the licensed hunting of the Swedish wolf; and same goes for the EU legal framework, which will focus directly on the Habitats Directive, rather than starting from its legal precedent, the Bern Convention (BC)³⁸. Afterwards, the Swedish framework will be analyzed, giving an overview of the national legal framework under which licensed hunting is being applied and deepening into the legal and scientific reasoning behind the Swedish Environmental Agency's decision to bestow the wolf FCS, addressing research question 1. Then, Swedish courts' relevant jurisprudence will be analyzed against the backdrop of the previous background in order to answer research question 2. Finally, the ongoing, although apparently stalled, EU Commission infringement procedure against Sweden, will be addressed in connection with the new EU Biodiversity Strategy 2030 and the continuously unfolding situation of the Swedish wolf's licensed hunting, to see what are the odds that this procedure will be "awakened" by the recent events. The thesis concludes with a reflection on the Swedish wolf's licensed hunting legislation in connection with its EU requirements, and linking this analysis to the broader legal framework of activity-related legislations regulating broad aspects of the environment, following the Environmental Law Methodology.

³⁸ Convention on the conservation of European wildlife and natural habitats (adopted 19 September 1979, in force 1 June 1982) UNTS 1284 (p. 209).

2 EU Framework

2.1 EU Biodiversity Strategy 2030

The latest piece of European policy that might hold potential for the Swedish wolf population is the European Biodiversity Strategy. This Strategy sets 2030 targets for European biodiversity, in order to reach a highly ambitious 2050 vision, where all worlds' ecosystems are restored, resilient and adequately protected.³⁹ This Strategy is built on four pillars, each with a set of key commitments related to European and/or global biodiversity. Although the first pillar "Protecting nature in the EU" is focused mainly on protected areas rather than in species protection, the importance given to the Trans-European nature network is directly relevant for the survival of highly migratory species. In this sense, the call on Member States to establish ecological corridors between protected sites in order to achieve genetic connectivity is highly relevant for wide-ranging carnivores such as the Scandinavian wolf, which suffers from inbreeding depression and is in dire need of migrants from Finland. Indeed, Member States have until 2024 to progress in their area-protection policies before the EU examines such compliance and assesses if a stronger legal approach is needed.⁴⁰ However, in terms of large carnivores, the most closely related part of the Strategy is arguably Pillar II "Restoring Nature in the EU", since it focuses specifically on species protection with concrete targets that, though still in progress,⁴¹ might raise the bar of Member States' ambition in large carnivore conservation. With the commitment to ensure that, by 2030, no habitat nor species' conservation trend or status deteriorates anymore, and that minimum a 30% of them achieve favourable conservation status or, at least, show a strong positive trend, this touches upon the management of strictly protected species such as the wolf. Among the commitments that were to be deployed under the second pillar, there was a Commission's proposal to formulate legally binding restoration targets by 2021, although this is, as of now, delayed.⁴²

Since Member States are only required to achieve new favourable conservation status or, at least, positive trends, for 30% of habitats and species by 2030, the question about which species or habitats might benefit from this is raised. The taxonomic bias in

³⁹ EC 2021, *EU Biodiversity Strategy for 2030*, p. 8.

⁴⁰ EC 2021, *EU Biodiversity Strategy for 2030*, p. 11.

⁴¹ EC, "EU Biodiversity Strategy Actions Tracker" (2022). <<https://dopa.jrc.ec.europa.eu/kcbd/actions-tracker/>>.

⁴² Ibid.

the EU Biodiversity Strategy has already been discussed in the Academia, mostly for its stronger emphasis on vertebrates and on more charismatic species at the expense of other ones.⁴³ However, this is not a guarantee that the wolf will be prioritized, since the Commission issued a Guidance to set the criteria for this prioritization, leaving a lot of questions unanswered:⁴⁴ for starters, 2019 is set as the baseline for assessing conservation trends in light of the 2030 targets, and, since FCS is not even required, this means that a mere increase in a population in the last three years could be regarded as a fulfillment of this commitment. This doesn't benefit the case of the wolf, since its population was decreasing in 2019. In this sense, setting the baseline in 2019 for all species and habitats, without considering the multiplicity of situations in which they might have been immersed in that specific year, can lower the ambition of Member States under this Strategy.

The Commission, in its Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the Strategy, foresees the problems that can be posed by non-EU border countries with regards to shared migratory species, naming specifically the over-exploitation of migratory species outside the EU.⁴⁵ This is particularly problematic for Sweden, since the Scandinavian population is shared with Norway, not duty-bound by the HD and whose practices are, according to several legal scholars, in breach of its international obligations for species conservation.⁴⁶ According to the Guidance, these situations might need to be addressed in the appropriate forums, which in this case would be the Bern Convention, since Norway and Sweden are both parties to it.⁴⁷ The Bern Convention precedes the HD and laid the basis for the latter to flourish.⁴⁸ However, the Bern Convention lacks effective enforcement mechanisms like the ones of the HD,⁴⁹ and its requirements for derogating

⁴³ Mammola et al. 2020.

⁴⁴ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*.

⁴⁵ *Ibid.*, p. 3.

⁴⁶ Trouwborst et al. 2017, p. 165.

⁴⁷ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*, p. 3.

⁴⁸ Trouwborst 2014, p. 91.

⁴⁹ For more information on the compliance mechanisms of the BC, see Trouwborst, A., Fleurke, F. & Linnell, J. "Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd" (2017) 20(2) *Journal of International Wildlife Law & Policy* 155–167, especially p. 158–159.

from strict protection are not so strict.⁵⁰ Thus, the practical consequence in terms of the commitments under the EU Biodiversity Strategy, which are, however, non-legally binding, might be that Sweden was scrutinized less harshly in regards to the Scandinavian wolf by the EU Commission, which, again, could lower the ambition. Nonetheless, the Commission also highlights the importance of transboundary migratory species, both shared with Member States or non-EU States, as deserving special attention and thus, with higher chances of being prioritized under the 30% subset target.⁵¹ Therefore, it remains to be seen how the Strategy might affect the Swedish wolf.

The Strategy is designed in a way that progress and target achievement will be assessed through the existing elements of the HD, that is, FCS and national reporting⁵². However, there is not scientific consensus on the meaning of FCS when applied in practice.⁵³ Thus, this scientific uncertainty makes the assessment less reliable, and reduces even more the options of the Swedish wolf to be prioritized under this 30% subset. This is because, according to the guidance, the 30% subset to be prioritized is logically reserved to those species that need it more urgently, for example, those that don't have favourable conservation status and, therefore, are in more need of a preferential treatment.⁵⁴ As much logical as this may seem, this can be rendered counterproductive if FCS is awarded to species whose actual conservation status is strongly debated by scientists. Since Sweden bestowed the wolf an FCS in 2013 with the opposition of the European Commission and of a strong part of the scientific community,⁵⁵ but nevertheless continues to categorize it as such, this means that the wolf will probably not be prioritized under the EU Biodiversity Strategy if that is dependent on its FCS. However, the same Guidance emphasizes the importance to combine the national reporting of Member States on their species' FCS with the European Red List of Species, in order to consider the "top priority candidates for targeted

⁵⁰ Art. 9 BC only requires that the derogation is *not detrimental to the survival of the population*, while article 16 HD requires that *the derogation is not detrimental to the maintenance of the populations [...] at favourable conservation status [...]*.

⁵¹ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*, p. 6.

⁵² National reporting refers to Article 17 HD, which requires Member States to elaborate a report on the implementation of the Directive every 6 years, forward it to the Commission and make it publicly accessible.

⁵³ Epstein et al. 2016.

⁵⁴ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*, p. 7.

⁵⁵ Epstein 2016, p. 223–224.

restoration/improvement measures”.⁵⁶ Since the Swedish government grants FCS to the wolf, but the Swedish Red List classifies it as Highly Threatened, there might still be a chance for the wolf to be prioritized.

Despite the fact that Pillar II is the one that relates more closely to the specific topic of species protection, Pillar III “Enabling transformative change” might be even more effective in terms of boosting environmental compliance. In this sense, one of its key commitments is to improve the implementation and enforcement of the Habitats’ Directive, since research showed that EU environmental legislation was fit for purpose but effective compliance was holding back its potential.⁵⁷ According to the Fitness Check 2016, the specific HD elements to be improved and to be addressed under the Strategy include weak enforcement and poor communication and stakeholder involvement, all of which are of direct importance for the wolf and play a role in the deployment of licensed hunting policies.⁵⁸ Although, in general terms, Pillar III’s commitment of stepping up the implementation and enforcement of environmental legislation will focus mostly on completing the Natura 2000 network especially at sea,⁵⁹ the reinforcement of species protection provisions to combat illegal activities will be an important part of this overall commitment, which can reduce the concerning rates of poaching that threaten the Scandinavian wolf and based on which the government is justifying licensed hunting.⁶⁰ Pillar III also encourages the broadening of standing for NGOs under the Convention on Access to Information, Public participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention)⁶¹, to which the EU is part. This is important because it’s been proven in numerous times that NGOs and public involvement are necessary for complementing the role of the EU Commission as EU’s watchdog.⁶² In this sense, ENGOs have been crucial for the scrutinization of wolf licensed hunting both in Finland, specifically with the *Tapiola case*,⁶³ and in Sweden, where the EU Commission

⁵⁶ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*, p. 6

⁵⁷ EC (2016) 472 final, p. 96.

⁵⁸ To know more, Lin et al. 2021.

⁵⁹ EC 2021, *EU Biodiversity Strategy for 2030*, p. 25.

⁶⁰ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*.

⁶¹ Convention on Access to Information, Public participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, in force 30 October 2001) UNTS 2162.

⁶² Epstein and Kantinkoski 2020, p. 2

⁶³ C-674/17 *Luonnonsuojeluyhdistys Tapiola*; and Epstein and Kantinkoski 2020, p. 2.

started an infringement procedure due to the action of four environmental NGOs that is still ongoing.⁶⁴

It's fair to say that, all in all, the EU Biodiversity Strategy sets highly ambitious targets. For their achievement, a cooperation-based European Biodiversity Governance Framework has been set to monitor Member States' implementation. While the Framework already counts on an Actions Tracker and a Target Dashboard with several indicators to track progress at EU and Member State level,⁶⁵ the Commission will assess in 2023 if a legally-binding approach is necessary instead.⁶⁶ Thus, the effectivity of this Strategy remains to be seen, since it's not the first time that the EU has issued a Strategy with the objective of halting biodiversity loss. The EU Biodiversity Strategy 2020, for example, was already rendered insufficient when, in 2015, the Commission assessed that deterioration was not decreasing at the desired pace.⁶⁷ In this sense, concerns over the utility of this proliferation of soft-law instruments have been raised, specifically by García Ureta. According to him, these strategies might have the opposite effect and modulate the legal mandate of the directives, which are much clearer and whose ambition is sometimes lowered through the diffusion of individual-state responsibilities under general claims on broad long-term visions.⁶⁸ This can definitely happen with regards to the requirement of increasing the trends in the conservation status for 30% of species, which can be read as a compromise from what's already established under article 2 HD's objective, i.e. the maintenance or restoration at FCS of species and habitats of Community interest.

2.2 Legal Framework: the Habitats Directive

2.2.1 Objective

The Habitats Directive is, together with the Birds Directive, the main legal tool used in the European Union for the protection of species. The HD was born out of the need for a more effective approach to biodiversity, since the Birds Directive and the Bern Convention were deemed insufficient, and the upcoming Rio de Janeiro Conference posed a good opportunity for enhanced ambition⁶⁹. Therefore, the HD was adopted on May 21 of 1992. It has an annex-based system where certain species and habitats are

⁶⁴ Darpö and Epstein 2014, p. 349.

⁶⁵ EC, <https://ec.europa.eu/environment/strategy/biodiversity-strategy-2030_en>.

⁶⁶ EC 2021, *EU Biodiversity Strategy for 2030*, p. 23.

⁶⁷ García-Ureta 2020, p. 5–6.

⁶⁸ *Ibid.*, p. 5.

⁶⁹ *Ibid.*, p. 220.

listed according to their protection requirements, and the Swedish wolf is classified as a species of community interest in Annex II(a) and Annex IV(a). The first concerns animal species of community interest whose conservation requires the designation of special areas of conservation, and the latter concerns animal species of community interest in need of strict protection. Moreover, the Swedish wolf is listed with an asterisk in Annex II because of its added importance as a priority species, that is, endangered and for whose conservation the EU “has particular responsibility”.⁷⁰

Its objective, stated on article 2, is to contribute towards ensuring biodiversity through the maintenance or restoration of natural habitats and species at favourable conservation status. The HD divides its protection in two main categories: the conservation of natural habitats and habitats of species in articles 3–11, and the protection of species from article 12–16. In this sense, the protection of species is independent of their location in a protected area or habitat, which the CJEU has interpreted as extending even to human-dominated landscapes.⁷¹ However, and since the HD applies to 27 different Member States with different idiosyncrasies and legal systems, article 2.3 acknowledges that measures enacted under this instrument will take into account economic, social and cultural factors, as well as regional and local characteristics. This is not to be understood as an independent basis for derogation from the strict protection granted to species, since this paragraph merely states what’s already obvious from a literal reading of the Treaty on the Functioning of the European Union⁷² in article 191(3) on environmental policy, that is, that in preparing such policies, “economic and social development” shall be taken into account.⁷³ Regarding social and cultural requirements, judgement C-182/02 on the Birds Directive makes it clear that tradition and culture aren’t legal basis for the withdrawal from strict protection when this is not grounded on a derogation from strict protection. In the words of the Advocate General in case C-10/96, concerning derogation from strict protection in the Birds Directive, “[t]hat such activities may be ‘ancestral’ or partake of an ‘historical and cultural tradition’ does not suffice to justify a derogation from the Directive”⁷⁴. Since the jurisprudence on the Birds Directive is relevant for the Habitats Directive, it can shed some light on the limitations of both

⁷⁰ Art. 1(h) HD.

⁷¹ C-88/19 *Asociatia “Alianta pentru combaterea abuzurilor” v. TM*, para 48.

⁷² Consolidated version of the Treaty on the Functioning of the European Union (26 October 2012) OJ L326/47.

⁷³ García-Ureta 2020, p. 223.

⁷⁴ C-10/96 Opinion of Advocate General Fennelly in *LRBPO and AVES v Région Wallonne*, para 36.

directives in terms of the flexibilization of their objectives and derogations.⁷⁵ Economic reasons have also been deemed to be insufficient to justify a derogation from strict protection according to the EU Commission.⁷⁶ This seems in line with the phrasing of the Bern Convention’s objective, which subjugates economic and recreational requirements to ecological ones in its homologue article 2 and which is of influence for the interpretation of the HD.⁷⁷ Thus, article 2(3) of the HD can be regarded as the operationalization of the proportionality principle for the purposes of adapting strict protection of species to the specificities of each circumstance. In this sense, and as legal scholar Jan Darpö explains, “[a]s with any use of the proportionality principle, it expresses the means of reaching the goal without changing it as such”.⁷⁸

2.2.2 *Favourable Conservation Status*

The HD introduces new concepts that aren’t clarified in the main text of the Directive, and which have been complemented by the issuance of EU Commission guidance documents as well as by jurisprudence of the CJEU, while only the latter is binding on Member States. Most importantly, measures taken under the Directive shall be aimed at restoring or maintaining species and habitats at Favourable Conservation Status.⁷⁹ In theory, FCS for species must fulfill three elements, all of which have to do with natural sciences and, thus, require a legal-ecological approach.⁸⁰ According to article 1(i), FCS for species means that the species concerned is “maintaining itself on a long-term basis as a viable component of its natural habitats”, that “the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future”, and that “there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis”.

Not only the definition itself introduces new terms without a concrete definition (e.g., natural range), but several elements inside this definition lack the necessary consensus among scientists regarding its meaning,⁸¹ curtailing legal certainty to an even

⁷⁵ Epstein and Chapron 2018, p. 80.

⁷⁶ EC(2021) 7301 final, p. 62 (3-56).

⁷⁷ Art. 2 BC: “The Contracting parties shall take requisite measures to maintain the population of wild flora and fauna at, or adapt it to, a level which corresponds in particular to ecological, scientific and cultural requirements, *while taking account of* economic and recreational requirements and the needs of sub-species, varieties or forms at risk locally” (emphasis added).

⁷⁸ Darpö and Epstein 2014, p. 367.

⁷⁹ Art. 2.2 HD.

⁸⁰ Epstein et al. 2016.

⁸¹ Ibid.

higher extent. In this sense, doubts on the level of discretion left to the Member States to operationalize FCS are still present. For example, the level at which FCS is assessed was traditionally regarded as being left to the discretion of Member States, but recent jurisprudence points in another direction, as will be explained below.⁸² Moreover, it is not clear what is the baseline against which the above-mentioned criteria shall be assessed. In this sense, it is not the same, for example, to assess if the natural range of the wolf is being reduced in comparison with prehistoric levels, which would be rather absurd, than to compare it, for example, with the range occupied in the 1960s, when it was practically extinct.⁸³ As it has been previously explained for the EU Biodiversity Strategy, setting the right baseline is crucial to assess compliance. However, some Member States have randomly established the baseline against which to assess FCS at the moment that the HD was put in place, i.e., 1992, even though one of the reasons why the HD was adopted was, indeed, that many species were not at an FCS at the time.⁸⁴ Also, what it means for a species to maintain itself *on a long-term basis* can pose doubts on what can actually be regarded as long enough. While some have interpreted long-term viability to entail a risk of extinction of less than 10% for the next 100 years, like the Large Carnivore Initiative for Europe (LCIE), other legal practitioners and natural scientists have interpreted the same provision as implying indefinite viability.⁸⁵ In the meanwhile, the EU Commission's guidance on the implications of FCS has been inconsistent and the CJEU jurisprudence hasn't discussed its definitive meaning either.⁸⁶

2.2.3 *System of Strict Protection*

Article 12 establishes a system of strict protection for fauna species of community interest, i.e. those listed in Annex IV(a), among which there is the wolf, in their natural range. This provision lists four general prohibitions, which include the deliberate capture or killing of specimens of the species, deliberate disturbance particularly during breeding, rearing, hibernation or migration periods, deliberate destruction or taking of eggs, and deterioration or destruction of breeding sites or resting places. For the case of licensed hunting, article 12.1(a) on the prohibition of all forms of deliberate killing is the most relevant.

⁸² C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 58.

⁸³ Darpö and Epstein 2014, p. 349.

⁸⁴ Epstein 2016, p. 238.

⁸⁵ *Ibid.*

⁸⁶ Epstein et al. 2016, p. 82–83.

The CJEU has interpreted article 12 in a broad way, examples of which would be how it has protected specimens even if outside of what would traditionally be understood as their natural range.⁸⁷ In this sense, first one must assess what is actually meant by natural range. Although such definition is not provided in the HD, it's been commonly understood as the spatial limits within which the species occurs, which might include, therefore, migration grounds.⁸⁸ In a case concerning a wolf in Romania, the CJEU stated that it would be incompatible with the objective of strict protection if it was systematically denied when wolves, such as in this case, were in a village in the midst of two protected areas, since that implied that migration was likely to occur.⁸⁹ Another feature that shall be highlighted when analyzing article 12, is its protection no matter what the actual conservation status of the species is. In this way, even if a species is thriving and one killing, capture, or mere disturbance wouldn't be significant at all for the species as a whole, still, this wouldn't be allowed unless justified under a derogation in article 16. Indeed, article 12 talks about specimens rather than species. Moreover, this was already clarified by the CJEU in the *Caretta-caretta case*,⁹⁰ where the fact that the species didn't seem to be affected by the disturbances on their breeding period or the deterioration of their breeding sites, since the nests weren't declining, was rendered pointless for the consideration of the necessity of strict protection.⁹¹

2.2.4 Derogation from Strict Protection

In contrast with the system of strict protection, the specific conservation status of a species is given significant weight for the appropriateness of derogations. Article 16 establishes the conditions under which a Member State may derogate from the strict protection awarded in article 12 and in article 15, the latter of which prohibits specific means of capture, killing and transport.⁹² For such derogation to occur, Member States first shall fulfill three tests⁹³: that the objective pursued is one of those listed in article 16.1(a)-(d) or meets the additional requirements of letter (e), which counteract for the absence of a specific objective; that there are no other satisfactory alternatives; and that such derogation is not detrimental to the maintenance at FCS of the populations of the species

⁸⁷ C-88/19 *Asociatia "Alianta pentru combaterea abuzurilor"* v. TM.

⁸⁸ EC(2021) 7301 final, p. 7 (1-9).

⁸⁹ C-88/19 *Asociatia "Alianta pentru combaterea abuzurilor"* v. TM, para 48 and 50.

⁹⁰ C-103/00 *Commission v Greece*, para 31.

⁹¹ *Ibid.*, para 30-31.

⁹² Article 16 lays down the conditions for derogating from article 13 and 14 as well, but for the topic of this thesis, only 12 and 15 are relevant, since these concern Annex IV species.

⁹³ EC(2021) 7301 final, p. 48.

concerned in their natural range. The burden of proof for demonstrating that these three tests are fulfilled lies in the competent authorities,⁹⁴ for which scientific evidence plays a key role.⁹⁵ According to the CJEU, the conditions laid down in article 16 for the granting of derogations must be interpreted restrictively since they must be in line with the overall objective of the HD to conserve biodiversity.⁹⁶ In this sense, it is important to note that article 16 is to be read as an element that functions inside of the coherent set of provisions of the directive in its entirety, so that, as the CJEU has stated, any derogation incompatible with the HD is not only in breach of article 16 but also of article 12.⁹⁷ Moreover, in a broader way, any such breach could be regarded as a violation of article 2, since it establishes the main objectives of the HD. Additionally, the CJEU has made it clear that the transposition of article 16 into national law must be fully binding and applied in a sufficiently clear and precise manner, and that administrative provisions are not enough in terms of proper transposition⁹⁸.

From the four pre-established objectives to be pursued with a derogation, (b) on the prevention of serious damage, for example to livestock, and (c) on the interests of public safety or other imperative reasons of overriding interest, have usually been used for killing wolves. However, licensed hunting in Sweden, as well as in other countries,⁹⁹ is being predicated mostly under letter (e), which leaves up to the competent authorities to decide upon an objective, though one must nevertheless be picked, and it must be in line with the overall objective of the HD and backed by sufficient scientific data.¹⁰⁰ Letter (e) allows for a derogation from strict protection

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.

As the derogations of article 16 constitute the majority of infringement proceedings initiated by the EU Commission regarding the HD,¹⁰¹ the CJEU has had the opportunity to shed some light on some of its elements, although there still remain several

⁹⁴ C-342/02 *Commission v Finland*, para 25.

⁹⁵ E.g., C-342/05 para 42-44; or C-674/17 para 45, 51, 66–67, 71 and 81.

⁹⁶ C-342/02 *Commission v Finland*, para 25.

⁹⁷ C-6/04 *Commission v United Kingdom*.

⁹⁸ C-315/98 *Commission of the European Communities v Italian Republic*, para 10.

⁹⁹ Epstein et al. 2019, p. 3.

¹⁰⁰ EC (2021) 7301 final, p. 56 (3-38).

¹⁰¹ Sobieraj and Zachareczuk 2016, p. 95.

questions that will try to be untangled along the lines of this thesis. Despite the fact that the EU Commission explains the “three tests” in the above-mentioned order, a literal reading of article 16 and the one more commonly followed by the judiciary starts with the two prerequisites. These are that there is “no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range”.¹⁰² Regarding the first pre-requisite, i.e., absence of satisfactory alternatives, these must be assessed against article 12’s set of prohibitions. For example, when Sweden justified the licensed hunt of wolves to reduce inbreeding, the measure was criticized since it should’ve considered other satisfactory alternatives that don’t imply a derogation from article 12.1(a), such as favouring the introduction of unrelated wolves.¹⁰³ The concept of proportionality is important for balancing alternatives, since economic or social aspects can be taken into account, although satisfactory alternatives that don’t imply a derogation can’t be discarded on the only ground of its economic cost.¹⁰⁴ Same goes for social aspects, since it is in the nature of environmental policies that these will entail a certain degree of adaptation of certain traditions for the common good of biodiversity.¹⁰⁵ As the Advocate General put it in case C-342/05 (*Finnish wolf case*), regarding wolf hunts in Finland,

an alternative is satisfactory not only if it would attain the objectives of the derogation equally well, but also if the disadvantages caused by the derogation would be disproportionate to the aims pursued and the alternative would ensure proportionality.¹⁰⁶

However, this poses doubts as long as economic costs and other “priceable” factors are confronted with the incalculable value of biodiversity, since these leads to legal uncertainty and deep philosophical questions as to the intrinsic value of species as a common good. Indeed, and because such balancing is everything but exact, one could come up with a partially satisfactory solution, but which left unaddressed a specific facet of the problem. For example, electric fences reduce wolf attacks to livestock, which shall be considered before resorting to a derogation under article 16.1(b) along with a whole array of other measures (e.g. compensation schemes or dog shepherds). If such measures were first implemented and, nonetheless, a redoubt of attacks continued to take place,

¹⁰² Art. 16.1 HD.

¹⁰³ Darpö and Epstein 2014, p. 364.

¹⁰⁴ EC (2021) 7301 final, p. 62 (3-56).

¹⁰⁵ C-10/96 Opinion of Advocate General Fennelly in *LRBPO and AVES v Région Wallonne* para 36.

¹⁰⁶ C-342/05 Opinion of Advocate General Kokott in *Commission v Finland*, para 27.

then, a new assessment would have to take place according to the EU Commission. This means that, in the specified case, a new proportionality assessment between the objective of strict protection and the objective of protecting livestock would have to be performed, which would only concern the number of remaining livestock that still suffered wolf attacks after electric fencing, compensation schemes or other measures had been implemented. Only then could a derogation take place, if the value of solving the remaining part of the problem was considered superior to the value of not killing an individual from an endangered species protected under the Habitats Directive.¹⁰⁷

As we shall see in Chapter 3.3, alternative solutions, in practice, haven't always been taken into consideration by national authorities, a clear example of this being the preliminary ruling in the case C-674/17 (the *Tapiola case*), where licensed hunting was issued in order to reduce poaching under article 16.1(e), but the CJEU had serious doubts as to whether the authorities had really considered other satisfactory alternatives. For example, increased monitoring of poaching and stronger enforcement of the law hadn't been sufficiently considered. Indeed, the CJEU didn't regard as sufficient evidence to prove the absence of satisfactory alternatives "the mere existence of an illegal activity or difficulties associated with its monitoring".¹⁰⁸ Similarly, in a previous infringement procedure regarding, again, Finnish wolf hunting, Finland was deemed to be in breach of the Directive due to its lack of proof on the absence of alternative solutions.¹⁰⁹ This case involved article 16.1(b) on the protection of livestock, for which non-lethal alternatives abound and aren't always taken into consideration. Therefore, the absence of satisfactory alternatives might be the Achilles heel of many attempts to derogate from strict protection.

The second precondition, i.e., that the derogation is not detrimental to the maintenance of the populations of the species concerned at an FCS, is more nuanced in terms of the rulings issued by the CJEU, as this concept is much more rooted into the specific context of the case at stake, that is, the species concerned, the current population trend, the targeted specimens, the scientific knowledge available, and a long etcetera.

¹⁰⁷ EC (2021) 7301 final, p. 62 (3-55).

¹⁰⁸ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 81.

¹⁰⁹ C-342/02 *Commission v Finland*, para 30–31, although the CJEU didn't finally rule on Finland's breach of the HD based on this ground, since the Commission hadn't proved the existence of an *administrative practice by the Finnish authorities* (para 39), and Finland was found in breach of the Directive for a lack of justification on the expediency of the hunt to prevent serious damage in accordance with article 16.1(b) HD (para 49.1).

Even though the CJEU hasn't yet explicitly established what is and what is not FCS,¹¹⁰ some notes can be drawn from its jurisprudence, which will be deepened in chapter 3.2. Two cases regarding wolf hunting in Finland have been crucial for understanding the requirements posed by FCS, and how the precautionary principle interacts with it. In the above-mentioned *Finnish wolf case*, the CJEU was confronted with the question of whether a wolf population that hadn't yet reached FCS could be hunted under letter (b) derogation grounds, i.e., preventative hunting to prevent serious damage to livestock and other types of property. The CJEU answered that, in theory, a derogation might still be allowed by way of exception as long as it was not such as to worsen the conservation status of the species.¹¹¹ An important element that the CJEU took into account was the fact that the wolf population had been increasing for the past years, so the Court considered that the door for derogations from strict protection for a species without FCS couldn't be completely shut.¹¹² However, in the more recent case regarding a preliminary ruling, i.e., the *Tapiola case*, the CJEU observed that, based on the current population trend of Finnish wolves, which was severely diminished, a derogation under letter (e) seemed at odds with the precautionary principle. Thus, a derogation may only be allowed if, according to best available scientific knowledge, there remained no uncertainty as to the prejudice of such derogation on the conservation status of the species.¹¹³ According to the 2007 Guidance Document of the EU Commission on species strict protection, which was already used by the CJEU in the former *Finnish wolf case*, "the less favourable the conservation status and trends, the less likely that the granting of derogations would be justified apart from under the most exceptional circumstances".¹¹⁴ Therefore, the Court employed a restrictive reading of the precautionary principle.

This rigidity may well be at odds with the actual reality of natural sciences and the dynamic concept of FCS, which leaves ample room for scientific uncertainty. This is why some scholars have raised some questions on how this restrictive precautionary principle might be compatible with the proportionality principle, since both principles are enshrined in the TFEU and thus deserve similar attention.¹¹⁵ Nonetheless, such a restrictive approach can definitely result in the benefit of the species' strict protection,

¹¹⁰ Epstein 2016, p. 244.

¹¹¹ C-342/02 *Commission v Finland*, para 29.

¹¹² *Ibid.*, paras 37–38.

¹¹³ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 66.

¹¹⁴ EC 2007, p. 62(48).

¹¹⁵ Sobotta 2021, p. 733.

since this strong requirement for scientific certainty creates an incentive for member States to improve their species' FCS and promote the sufficient scientific research to back their derogation decisions.¹¹⁶ This “progressive tightening”¹¹⁷ of the CJEU jurisprudence can also be read in terms of the different context: while in the first case the species was increasing, in the second case the species was in a much worse situation, so that this *tightening* could be read as the progressive rigidity of the precautionary principle when the risk of extinction becomes more real. In this sense, the *Tapiola case* has shed some new light on how FCS is to be regarded under article 16 in the light of this principle: first and foremost, no derogation may take place if it's not guaranteed that these won't be detrimental to the maintenance of the populations at FCS in their natural range, and secondly, such derogations shall be subject to an assessment of the conservation status and the derogation's impact on it, at the local and national level, and, where applicable, to the biogeographical or even at cross-border level.¹¹⁸ This, together with the requirement of assessing the impact in conjunction with the cumulative impacts of the other derogations issued under the Directive,¹¹⁹ leaves less room available for what was supposed to be, in theory, a decision up to the Member States, that is, the determination of the level at which to assess FCS.¹²⁰

2.2.5 *Extra-requirements in letter (e) of Article 16*

Once these two pre-requisites have been fulfilled, letter (e) opens up for a whole new assessment that national authorities must fulfill if they don't want their derogations to be overturned by the judiciary. Since this is the legal basis for current licensed hunting in Sweden, it will be thoroughly explored in chapter 3. However, to set the theoretical framework, some notes on the scope of article 16.1(e) will be drawn here in advance.

Letter (e) allows for the derogation from strict protection only when several additional conditions are fulfilled: it must be done under strictly supervised conditions, on a selective basis, to a limited extent, in limited numbers specified by the competent authorities and applied to certain specimens. This derogation allows for *the taking or keeping*, which rose some doubts as to whether it allowed for the killing or only for other non-lethal derogations from strict protection, since the official translation of this

¹¹⁶ Ibid.

¹¹⁷ García-Ureta 2020, p. 350.

¹¹⁸ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 80.

¹¹⁹ Ibid., paras 59–62.

¹²⁰ García-Ureta 2020, p. 355.

provision in some of the different languages of the Member States employed a wording that was likely to exclude the killing, and all EU official translations are equally valid.¹²¹ However, with the issuance of the *Tapiola* preliminary ruling it is now clear that *taking or keeping* encompasses the possibility of lethal measures. Nevertheless, and because this is the only letter that doesn't specify an objective to be pursued, it must be noted that an objective shall nevertheless be given, and it should be backed by rigorous scientific data.¹²²

The precautionary principle, once again, plays an important role for the capacity to justify the need for a derogation. In the *Tapiola case*, the Finnish authorities argued that licensed hunting for population management purposes could reduce poaching and, thus, be in the benefit of the species and subsumable under letter (e). It is noteworthy how the precautionary principle was articulated in opposite directions by the national judiciary and by the CJEU. When the NGO *Tapiola* argued in the national courts that, based on the precautionary principle, such hunting could only proceed if it was proved that it would not be detrimental to the species' conservation status, national courts reversed the precautionary principle to support the continuation of what was deemed as an important "experiment" in the words of the Finnish government.¹²³ In this sense, the Eastern Finland Administrative Court, for example, denied the requested injunctions because, based on the precautionary principle, an injunction would deprive the wolves of the opportunity to be helped through their licensed hunt for the purposes of reducing poaching.¹²⁴ Thus, based on the precautionary principle, such hunts had to continue for the sake of the wolf population. The CJEU, employing a much more logical approach, used the same precautionary principle to argue the contrary: if there was no scientific evidence as to the effectivity of licensed hunting for reducing poaching to an extent that it had an overall net positive effect on the species conservation status, the derogation couldn't take place.¹²⁵ Therefore, it was up to the national court to establish if such link of causality, between licensed hunting and poaching reduction, could be backed by sufficient scientific data. Thus, even though it did not close the door for a derogation based on such grounds, it did set the bar quite high for the national authorities to prove such necessity. The

¹²¹ Epstein et al. 2019, p. 4.

¹²² C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 45.

¹²³ Epstein and Kantinoski 2020, p. 7.

¹²⁴ *Ibid.*, p. 6.

¹²⁵ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, paras 66 and 80.

Tapiola case is crucial for assessing Sweden's current licensed hunting policies, since these are based on the claim that they can tackle poaching and reduce inbreeding.¹²⁶

Be that as it may, an objective must always be given under letter (e), which can't be confused with those of (a)-(d). Therefore, according to the CJEU, only if the objective pursued doesn't fall into any of the previous categories, article (e) might be utilized. Otherwise, letter (e) runs the risk of becoming a catch-all provision and thus deprive article 16 and 12 of their effectiveness.¹²⁷ Even if an objective can be proved as valid under the terms discussed, article 16.1(e) still adds more requirements on whose grounds a derogation might still be deemed incompatible. Accordingly, such derogation must be targeted at certain specimens in limited numbers, under strictly supervised conditions, on a selective basis and to a limited extent. Although these conditions will be scrutinized in much more detail in point 3.3 in the light of the Swedish case, some notes shall be drawn here in order to understand the nuances of these requirements, according to what the CJEU established in the *Tapiola case* and the guidance of the EU Commission.

First, regarding the *limited numbers* of certain specimens of the species, this condition is highly dependent on the population level, the conservation status and the biological characteristics of each species. However, it must always be backed by rigorous scientific data relating to “geographic, climatic, environmental and biological factors as well as those enabling an assessment of the situation regarding the species' reproduction and total annual mortality rate owing to natural causes”,¹²⁸ as well as the incidental killing and other derogations.¹²⁹ The limited numbers requirement also implies the consideration of other cumulative impacts, so that letter (e) doesn't constitute a risk of a significant negative impact on the population structure, even if that specific number of individuals is not detrimental, in itself, to the maintenance of the population at FCS in their natural range.¹³⁰ According to the EU Commission, this condition might require cooperation between the different authorities in charge of such population, so that, in the case of wide-ranging vertebrates such as wolves, Member states that share a population might have to coordinate between them in order to establish a common position on what are limited

¹²⁶ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*, p. 4.

¹²⁷ *Ibid.*, paras 34-37.

¹²⁸ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 71.

¹²⁹ EC (2021) 7301 final, p. 57 (3-42).

¹³⁰ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 72.

numbers under letter (e).¹³¹ The emphasis of letter (e) on limited numbers might sound reiterative, as article 16(1) already requires any derogation to not be detrimental to the maintenance of the populations concerned at FCS in their natural range. Thus, this reiteration on the need to derogate only in limited numbers and to a limited extent, seems to reflect an intention by the legislator to impose a higher restriction level to this provision.¹³² In this sense, these numbers must be clearly specified in the derogation decisions.¹³³

Regarding the requirements of *selectivity* and of a *limited extent*, the CJEU has interpreted these as entailing an obligation to establish the number of specimens “in the narrowest, most specific and efficient way possible” and, depending on the circumstances, “limited not only to the species concerned or to the types or groups of specimens thereof, but also to individually identified specimens”.¹³⁴ Indeed, the CJEU made it clear in the *Tapiola case*, where it stated that a derogation wouldn’t be sufficiently selective if it merely recommended certain individuals to be killed, but it wasn’t mandatory to do so.¹³⁵ The lack of the above-mentioned requirements also put into question the allegedly strictly supervised conditions of the hunt, since these are regarded as the framework under which the previous requirements shall be effectively monitored.¹³⁶ However, as the *Tapiola case* was a preliminary ruling, it was up to the national court to decide the final outcome, although based on the CJEU ruling. Therefore, as regards to the condition of *strictly supervised conditions*, it mainly implies that national authorities must make sure that the other requirements of letter (e) are complied with before the derogation is issued, effectively control it while it takes place and monitor its subsequent impact.¹³⁷ Thus, a lack of selectivity in the derogation, as in the *Tapiola case*, can trigger the breach of this requirement as well.

2.2.6 Reporting obligations of Article 16.2

Last but not least, article 16.2 poses an obligation on Member States to submit a biannual report on article 16’s derogations, based on which the EU Commission must issue an opinion in the next 12 months. These reports shall include some of the

¹³¹ EC (2021) 7301 final, p. 57 (3-42).

¹³² *Ibid.*, p.58 (3-43).

¹³³ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 72.

¹³⁴ *Ibid.*, para 73.

¹³⁵ *Ibid.*, para 77.

¹³⁶ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 74.

¹³⁷ *Ibid.*

information relevant for the assessment of the derogation's compliance with the HD, although it's everything but exhaustive. As an example, there lacks an explicit obligation to inform on the rejected alternatives or the scientific data used, since these requirements are modulated with the expression *if appropriate*.¹³⁸ On top of this, the number of Member States ignoring this provision and not submitting their biannual reports has increased exponentially: whilst in the period of 2005-2006 five member states didn't submit their report,¹³⁹ in the last available overview of the derogation reports, 19 Member States haven't submitted them.¹⁴⁰ To make things worse, from those reports that are submitted, not all of them are complete. In this sense, reports are filled with legal uncertainty as to several crucial features: on one hand, it doesn't seem to be compatible with the limited nature of article 16 that some derogation permissions showed in the reports contain up to hundreds of individual licenses therein,¹⁴¹ or the fact that the number of specimens mentioned in such reports sometimes don't even refer to the actual number of taken individuals, but to the maximum number allowed under territorial quotas which might as well not be reached in practice. While the first case would suggest a smaller number than the actual one, the latter case might overestimate the scope of the issued derogations. Finally, the Commission noted, on a composite report for the period 2007-2008, that it was not unusual that in member states' reports "a single derogation covers several species and, in some cases, even a whole taxonomic group vaguely defined".¹⁴² This deliberate generality hinders the Commission's capacity to assess countries' compliance. However, neither the EU Commission nor the public concerned have decided to bring this breach of law to the CJEU up to this day.

¹³⁸ Art. 16.3(a) HD.

¹³⁹ García-Ureta 2020, p. 356.

¹⁴⁰ EC "Overview on derogation reports under Art. 16 of the Habitats directive & links to national reports" (25 November 2021). <<https://circabc.europa.eu/ui/group/173a90fc-40bf-492d-a3a9-df99c4aa8807/library/e958a0a0-dff4-4953-9428-ee3f8f556aa6/details>>.

¹⁴¹ García-Ureta 2020, p. 357.

¹⁴² Ibid.

3 Sweden framework

3.1 Current Swedish licensed hunting policies

The most relevant provisions for wolves' licensed hunting in Sweden aren't to be found in the Swedish Environmental Code (1998:808)¹⁴³ nor in the Swedish Species Protection Regulation (2007:845)¹⁴⁴, but rather in the Hunting Act (1987:259)¹⁴⁵ and the Hunting Regulation (1987:905)¹⁴⁶. In this sense, decisions regarding licensed hunting of wolves aren't appealable to Swedish environmental courts either, but rather to the Administrative Court of Luleå.¹⁴⁷ The prohibitions established in article 12 HD are transposed into Swedish law through section 4 of the above-mentioned Species Protection Regulation, and the derogations of article 16 HD, through section 14 of the same regulation. However, the third paragraph of section 4 excludes hunting from the scope of these prohibitions and subsequent derogations, which are regulated under the Hunting Act and the Hunting Regulation.

In this sense, licensed hunting is defined in section 23 c of the Hunting Regulation in accordance with the conditions established in article 16.1(e) HD: there must be no other suitable solution, the hunting can't make it difficult to maintain a favourable conservation status for the species' population in its natural range, the hunt must be appropriate for the population's size and composition, it must take place selectively and under strictly controlled conditions. However, the requirement of a *limited extent* and *limited numbers* established in article 16.1(e) HD is here substituted by the requirement that the hunt is appropriate regarding the population's size and composition. This might pose problems regarding the formal transposition of the Directive, since it's not the same that a hunt is *appropriate* to the size of a population than that it is *limited*, which implies a higher level of constraint, no matter what the actual situation of the population might be.¹⁴⁸

The fact that wolves' licensed hunting is not regulated under the Environmental Code nor the Swedish Species Protection Regulation doesn't mean that wolf licensed hunting is not an environmental matter, not only due to its international and EU environmental legal framework, but because of the Swedish institutions in charge of its

¹⁴³ Miljöbalk (1998:808).

¹⁴⁴ Artskyddsförordning (2007:845).

¹⁴⁵ Jaktlag (1987:259).

¹⁴⁶ Jaktförordningen (1987:905).

¹⁴⁷ Stenseke 2021, p. 282.

¹⁴⁸ E.g., C-103/00 *Commission v Greece*, para 31.

deployment.¹⁴⁹ The Swedish wolf management is, ultimately, the responsibility of the Ministry of Environment.¹⁵⁰ Additionally, it is the Swedish Environmental Protection Agency (SEPA) who is in charge for the overall assessment of the wolves' FCS and of the licensed hunting deployed by the different predator management areas.¹⁵¹ However, it is the intention of the predator policies enacted by the Swedish Parliament (Riksdag) that the management of wolves is as regional as possible,¹⁵² which means that, in practice, the County Administrative Boards (CABs) are the ones who decide on licensed hunting, always under SEPA's conditions. In this sense, SEPA can delegate the possibility to decide on licensed hunting to CABs in accordance with article 24a of the Hunting Regulation, and this decision may be revoked if SEPA's continuous assessment proves this regionalized management to endanger wolves' FCS.¹⁵³

It shall be noted that CABs can't always apply licensed hunting under delegation from SEPA, as several requirements shall first be met. First and foremost, reference values for wolves' FCS in Sweden are set, below which licensed hunting can't take place. The level is currently set at 300 wolves,¹⁵⁴ together with other requirements such as the need for at least 1 reproducing immigrant joining the Swedish wolf population per wolf generation (5 years).¹⁵⁵ The reference value is assessed through the number of wolf rejuvenations in each management area, which are, at the moment, established at a minimum of 30 wolf rejuvenations in total. In the Northern Predator Management Area only 1 annual rejuvenation is required, and only 0.5 in the Southern one. Thus, it is in the Central Predator Management Area where there is more wolf density, with 28.5 annual rejuvenations required.¹⁵⁶ Since each predator management area is composed of several CABs, these may decide on licensed hunting even if, in their specific county, they haven't reached minimum levels, as long as they don't endanger the minimum levels of the total administrative area as such.¹⁵⁷ Furthermore, decisions concerning licensed hunting have

¹⁴⁹ Stenseke 2021, p. 73–74.

¹⁵⁰ Ibid., p. 74.

¹⁵¹ Ibid., p. 216.

¹⁵² Naturvårdsverket 2021, *Beslut om att överlämna möjligheten att fatta beslut om licensjakt på varg till länsstyrelserna*, p. 10.

¹⁵³ Ibid., p. 8.

¹⁵⁴ Ibid., p. 3.

¹⁵⁵ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 7.

¹⁵⁶ Naturvårdsverket 2021, *Beslut om att överlämna möjligheten att fatta beslut om licensjakt på varg till länsstyrelserna*, p. 4.

¹⁵⁷ Ibid., p. 2.

only been delegated upon the CABs of the Central Predator Management Area.¹⁵⁸ The minimum levels were decided by SEPA on 9th May 2019 and are applicable until 9th May 2024 or as otherwise indicated.¹⁵⁹ However, it is not SEPA, but rather the same CABs, that are entrusted with the counting of wolves, without which no minimum levels would be sorted out.¹⁶⁰

Since 2010, CABs rely on the so-called Wildlife management Delegations to enhance co-management and stakeholder involvement, and together, these two bodies are of big importance in the decision-making procedure by which minimum levels of rejuvenations are established.¹⁶¹ The procedure is circular, starting with a delegation from SEPA and ending with its approval of the definitive proposal. In this sense, CABs propose a minimum number of rejuvenations, which is then approved by the Wildlife management Delegations. These proposals are later approved by a Cooperation Council (Samverkansråd) which makes sure that the overall number of each county doesn't endanger the overall national wolf population, and only then, this proposal is submitted to SEPA for its approval.¹⁶² Once the minimum levels are set, those CABs that meet the requirements can decide upon licensed hunting in their respective counties, although no decision on wolf licensed hunting may be taken after 1st October of each year.¹⁶³ As was previously mentioned, these decisions are appealable to the Administrative Court of Luleå,¹⁶⁴ a procedure that counts on three instances of appeal on the national level.¹⁶⁵

The CABs that are currently applying licensed hunting are all in Central Sweden, i.e., Dalarna, Gävleborg, Västmanland, Örebro and Värmland. The total number of killings in 2022 was of 28 wolves. However, Stockholm, Västra Götaland and Uppsala have been delegated the possibility to kill as well. Since these decisions are valid until 28

¹⁵⁸ Naturvårdsverket 2021, *Beslut om att överlämna möjligheten att fatta beslut om licensjakt på varg till länsstyrelserna*, p. 10.

¹⁵⁹ Naturvårdsverket 2021, *Beslut om att överlämna möjligheten att fatta beslut om licensjakt på varg till länsstyrelserna*, p. 4. However, this might change with the latest decision of the Swedish Parliament (n 11) to reduce the wolf population at about 170 individuals.

¹⁶⁰ Stenseke 2021, p. 217.

¹⁶¹ *Ibid.*, p. 268.

¹⁶² "Nationell förvaltningsplan för varg. Förvaltningsperioden 2014–2019", quoted in Stenseke 2021, p. 268.

¹⁶³ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*, p. 1.

¹⁶⁴ Stenseke 2021, p. 282.

¹⁶⁵ *Ibid.*, p. 247.

February 2022,¹⁶⁶ the hunting season of 2022 is over and these are the final numbers on wolf licensed hunting for 2022, accounting for 7% of the population.¹⁶⁷ Genetic factors are taken into account, since licensed hunting shouldn't take place where genetically important wolves have established (i.e., immigrant wolves non-related to the Scandinavian sub-population and their offspring), and extra supervisory measures shall be put in place to ensure that illegal hunting connected to the licensed hunt doesn't jeopardize their survival either.¹⁶⁸ The purpose of the hunt must be clearly stated in the corresponding decisions, with sufficient scientific data to justify the utility of the licensed hunt to achieve such purpose. In this sense, SEPA's guidance in connection with the decision to delegate licensed hunting decisions on CABs for 2022 mentions examples of what would be deemed as appropriate purposes, for example, to reduce poaching, or to reduce the socio-economic and psychosocial impact of wolves on people.¹⁶⁹ Regarding the latter reason, it shall be noted that socio-economic interests shouldn't be used as an independent basis for derogation according to CJEU case-law,¹⁷⁰ but the rationale and the appropriateness under EU law of the Swedish licensed hunt will be addressed in depth in Chapter 3.3.

In its guidance, SEPA mentions the *Tapiola case* as an example of the validity of the purpose of reducing poaching.¹⁷¹ The report goes on to say that the *Tapiola case* confirms the criteria applied by the Swedish Supreme Administrative Court (HFD), who, in 2016, started a shift in jurisprudence that continues up to this day. Before 2016, most licensed hunts were stopped by Swedish Courts on the grounds that SEPA wasn't providing sufficient scientific data to back the lack of appropriate alternatives or to prove the connection between licensed hunting and the purpose of the hunt. However, in 2016 with the Administrative Court in Luleå and later the HFD, the scientific research provided by SEPA was looked at in a more procedural, rather than substantive way, that is, in a

¹⁶⁶ Naturvårdsverket 2021, *Beslut om att överlämna möjligheten att fatta beslut om licensjakt på varg till länsstyrelserna*, p. 1.

¹⁶⁷ Naturvårdsverket, "Jakt på varg" (2022). <<https://www.naturvardsverket.se/amnesomraden/jakt-och-vilt/jakt-pa-rovdjur/jakt-pa-varg>>.

¹⁶⁸ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*, p. 6.

¹⁶⁹ *Ibid.*, p. 4.

¹⁷⁰ E.g., C-371/98 *First Corporate Shipping* paras 25–26.

¹⁷¹ Naturvårdsverket 2021, *Naturvårdsverkets vägledning i samband med beslut om att överlåta möjligheten att fatta beslut om licensjakt på varg 2022 till länsstyrelserna*, p. 4.

more bureaucratic manner than it was done before.¹⁷² In the words of Stenseke, G. in his doctoral thesis *Entangled Law*,

[a]lthough they emphasized the importance of legitimate aims, they also assessed more circumstances than previous courts and they seemed to look at the reports a bit more as formalities, rather than examining their relations to the arguments again.¹⁷³

Thus, it's interesting how SEPA's reports and Swedish case law have relied on the purpose of reducing poaching to allow licensed hunting as a matter of fact ever since the *Tapiola case*,¹⁷⁴ but they haven't applied the same high standards applied in this case to assess the lack of satisfactory alternatives and the sufficient scientific data to back such derogations, in connection with the precautionary principle.

3.2 Favourable Conservation Status

3.2.1 What does Favourable Conservation Status imply?

What can be regarded as FCS and what not, has deep implications for the Swedish wolf licensed hunting, since FCS is a prerequisite to apply derogations from strict protection. Moreover, even if it were still possible to derogate from strict protection for a species without FCS, in accordance with the CJEU in the *Finnish wolf case*, such derogation would have to be interpreted even more strictly and *by way of exception*.¹⁷⁵ Thus, first one must ask where does this term originate: it was first coined by the Convention on the conservation of migratory species of wild animals in 1979,¹⁷⁶ and the HD adapted it to the specific EU situation thirteen years later. Since conservation status is applied both to habitats and to species, it will be the latter definition the one that will be assessed in the following lines. Article 1(i) HD describes the species' conservation status as "the sum of the influences [...] that may affect the long-term distribution and abundance of its populations" in the Member States' territory.¹⁷⁷ Furthermore, the conservation status will be deemed as favourable when it fulfils three prongs:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and

¹⁷² Stenseke 2021, p. 285.

¹⁷³ Ibid.

¹⁷⁴ Stenseke 2021, p. 290–291.

¹⁷⁵ C-342/02 *Commission v Finland*, para 29.

¹⁷⁶ Convention on the conservation of migratory species of wild animals (adopted 23 June 1979, in force 1 November 1983) UNTS 1651.

¹⁷⁷ Art. 1(i) HD.

- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

-there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis.¹⁷⁸

For the sake of clarity, it is mainly the first prong, on population dynamics data, that will be assessed here, since it's the one that presents more problems for the Swedish Government when trying to justify FCS for wolves. Nonetheless, the distribution of the population and of the habitat can and has raised controversy due to the permanent exclusion of wolves from the reindeer herding areas in northern Sweden, but since it is licensed hunting that is being assessed in these lines, the first prong is arguably the most important one, apart from the fact that an analysis of the conflict with Sami reindeer herding would exceed the purpose of this thesis.

That wolves are a *viable component* of their *natural habitat* entails several questions that live on the margins of law, science and policy. Firstly, viability of a species is understood as referring to the scientific concept of population viability analysis studied in conservation biology.¹⁷⁹ However, that a population is viable might imply several prongs apart from the purely demographic ones, that is, also genetic, ecological and, maybe, even evolutionary capacity.¹⁸⁰ Which of these elements are necessary to fulfil the viability requirement is not so clear, since the CJEU hasn't dealt directly with FCS up to this day and the guidance of the EU Commission, apart from being non-binding, has been inconsistent inasmuch as it has endorsed guidelines stating contradictory information if assessed against the own EU Commission's guidance on this matter.¹⁸¹ In this sense, the EU Commission has endorsed the LCIE Guidelines (2008)¹⁸² as best practice, which focus mostly on demographic viability through the calculation of Minimum Viable Population (MVP), for which they recommend the IUCN Red List Criterion E, i.e., a risk of extinction below 10% for the next 100 years.¹⁸³ However, the designation of IUCN criterion E has been deemed as arbitrary and unacceptable both by legal scholars and by natural scientists, not only because it accepts a much higher risk than what is deemed normal in the scientific community, but because it focuses narrowly on demographic

¹⁷⁸ Ibid.

¹⁷⁹ Laikre et al. 2009, p. 1378.

¹⁸⁰ Epstein et al. 2016, p. 84.

¹⁸¹ Ibid., p. 83.

¹⁸² Linnell et al. 2008.

¹⁸³ Epstein et al. 2016, p. 83.

viability at the expense of a broader perspective on population viability.¹⁸⁴ Furthermore, the use of IUCN criteria should be questioned, according to legal scholar Yaffa Epstein, since these are designed to prioritize the most endangered species at a global level, but that prioritization, in the European Union, was already executed by the inclusion of certain species in the Annexes of the HD.¹⁸⁵ In this sense, a 5% risk in the next 100 years has been more commonly used in the Academia¹⁸⁶, but the first formulation of MVP was situated at a level below 1% for the next 1000 years.¹⁸⁷

Be that as it may, MVP can't be confused with FCS, since the former is necessarily smaller than the latter, as its name indicates, adding to the fact that MVP only assesses a potential prong of FCS, that is, demographic viability. However, and since MVP is a factor that is usually taken into account for the assessment of FCS, it should be noted that the 2011 EU Commission Guidelines referred to an article that understood MVP as consisting of a risk below 1% over the next 40 generations.¹⁸⁸ Although new EU Commission Guidelines replace the old ones, this might not be so clear when the EU Commission merely endorses as best practice the Guidelines of another institution (i.e., LCIE Guidelines). However, and since the interpretative value of the LCIE Guidelines for the FCS assessment stems from the EU Commission's approval, it seems reasonable to understand that it is the latest opinions being issued by the Commission that supersede its own previous recommendations when they give contradictory advice on a specific topic. Moreover, the text of the EU Commission Guidelines doesn't mention the IUCN criterion E anywhere.

Be that as it may, the European Commission's Explanatory Notes and Guidelines for the period 2013-2018 on the Reporting under Article 17 of the HD,¹⁸⁹ just as well as the LCIE Guidelines, have repeatedly emphasized that MVP is necessarily lower than

¹⁸⁴ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 60-61.

¹⁸⁵ Ibid., p. 60; Epstein 2016, p. 230.

¹⁸⁶ Curtis Flather et al. 'Minimum Viable Populations: Is There a "Magic Number" for Conservation Practitioners?' (2011) *Trends Ecol Evolut* 307, 308; quoted in Epstein 2016, p. 230.

¹⁸⁷ M Shaffer, "Minimum population Sizes for Species Conservation" (1981) 31 *Bio Sci* 131, 132; quoted in Epstein 2016, p. 230.

¹⁸⁸ Traill, L.W., Brook, B.W., Frankham, R.R. & Bradshaw, C.J. (2010) "Pragmatic population viability targets in a rapidly changing world". *Biol. Cons.*, 143, 28-34; quoted in Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 60.

¹⁸⁹ DG Environment 2017.

FCS,¹⁹⁰ since, according to the EU Commission, MVP is calculated as the *avoidance of extinction risk*, and demographic viability is only one of several features to take into account when assessing FCS.¹⁹¹ In this sense, the EU Commission Guidance elaborates on the elements that should be taken into account when calculating Favourable Reference Values (FRV), used as a tool to assess FCS, and among which the use of MVP might be helpful.¹⁹² Favourable Reference Population (FRP) is regarded as the reference at which the long-term viability of a species' population is ensured, and it is a type of FRV used to evaluate the conservation status of species.¹⁹³ For example, favourable reference values shall include “ecological and biological considerations”, and these are “always bigger than the minimum viable population (MVP) for demographic and genetic viability”.¹⁹⁴ Thus, a qualitative approach, rather than merely demographic, shall be the one used for calculating FRP. Moreover, not only MVP is necessarily smaller than FRP or FCS, but FRP itself should take into account the precautionary principle through the inclusion of “a safety margin for uncertainty”.¹⁹⁵

The idea that FCS includes ecological apart from demographic viability has been supported not only by the above-mentioned Guidelines, but also, according to legal scholar Yaffa Epstein, based on the main wording of the HD, whose definition of FCS requires species to be viable as a *component of its natural habitats*, so that the ecosystemic relations between the species and its habitat should be functional as well for the species to not only be demographically viable, but to perform its ecological role in its natural habitat.¹⁹⁶ This goes in line with the purpose of the Habitats Directive of contributing to biodiversity, and with the goal of having a functioning Natura 2000 network, since that implies functioning ecosystems as such. The importance of genetic viability is emphasized by the need of the species to maintain itself *on a long-term basis* in order to reach FCS, since long-term species' survival is not possible without sufficient genetic diversity. As Laikre et al. puts it, “genetic diversity is the raw material for evolution and thus provides the biological capacity for populations to respond to future environmental changes”.¹⁹⁷ What is deemed to be a long-term basis is not clear either, though the

¹⁹⁰ Linnell et al. 2008, p. 18–20.

¹⁹¹ DG Environment 2017, p. 113.

¹⁹² Ibid., p. 111.

¹⁹³ Ibid., p. 38 and 109.

¹⁹⁴ Ibid., p. 110.

¹⁹⁵ Ibid.

¹⁹⁶ Epstein 2016, p. 229

¹⁹⁷ Laikre et al. 2009, p. 1379.

Preamble of the Habitat Directive might guide the interpretation of this term. In this sense, the HD uses the term *natural heritage* referring to threatened habitats and species, which implies the will to preserve them for future generations. Indeed, the Preamble of the Bern Convention explicitly states this intention to hand the natural heritage to future generations, just as the European Biodiversity Strategy in its foreword when talking about the biodiversity crisis: “We owe it to nature, to people and to future generations”.¹⁹⁸ Moreover, some scholars argue that the HD could actually require indefinite viability,¹⁹⁹ which could be concluded as well from the latest EU Guidance on article 17. Here, the Commission argues, when comparing Favourable Reference Values applied to range and population size of species, that they’re related in the sense that the range has to be appropriate “to include and maintain the evolutionary potential of a species”.²⁰⁰ In this sense, evolutionary potential can only be warranted at levels at which indefinite viability is potentially possible.²⁰¹ Finally, the idea of setting a time limit for the viability of the species, even if in the long-run, seems at odds with the purpose of the Directive of conserving biodiversity.

All these elements are important to understand what is a viable population under the HD, since a population might need lower numbers to be merely demographically viable, while genetic or ecological viability imply higher ones. Indeed, the numbers may vary deeply if only demographic viability is considered. According to a study developed by Skandulv²⁰² and commissioned by SEPA, demographic viability could be warranted merely with an MVP of 100 individuals.²⁰³ Genetic viability, on the other hand, requires, firstly, an assessment of the effective population, i.e., the individuals effectively reproducing and contributing to the production of the next generation.²⁰⁴ The most common rule being applied by biologists sets a minimum of 500 effective individuals (N_e) to warrant genetic viability.²⁰⁵ However, the total number of individuals to which the formula $N_e=500$ translates is not clear since it depends on many factors. For example, some biologists recommend that the effective population number constitutes a fifth of the

¹⁹⁸ EC 2021, *EU Biodiversity Strategy for 2030*, p. 4.

¹⁹⁹ Epstein et al. 2016, p. 86.

²⁰⁰ DG Environment 2017, p. 111.

²⁰¹ Epstein 2016, p. 233.

²⁰² Skandulv is the Scandinavian Wolf Research Project, dependent of the Swedish University of Agricultural Sciences, see <<https://www.slu.se/en/departments/ecology/research/teman/wildlife-and-predators-/skandulv/>>.

²⁰³ Chapron et al. 2012, p. 8.

²⁰⁴ Sbordoni et al. 2012, p. 609.

²⁰⁵ Laikre et al. 2009, p. 1379.

total one, which in this case would translate into a total population of 2500 individuals, while others argue for even higher numbers if evolutionary potential is to be warranted, so that $N_e=1000$ would be necessary instead. In Flanders, Belgium, for example, the number of 5000 individuals has been required to achieve FCS for species.²⁰⁶ For the Scandinavian wolf, $N_e=500$ has been understood as implying 1700 individuals, only for the case that connectivity with other countries was lacking,²⁰⁷ which is the value adopted as well in other EU countries for wolf populations, e.g., Spain and Romania.²⁰⁸ The CJEU, on the other hand, in a case concerning the Alsace hamster, accepted a study on MVP that understood genetic viability as implying 1500 individuals over 600 ha. The problem with these estimations is, however, that each species is different, and one can't easily draw numerical conclusions from a case regarding another species.

3.2.2 *Does the Swedish wolf have Favourable Conservation Status?*

So, what is Sweden requiring for wolves when it claims that they have reached FCS? Sweden currently considers wolves at FCS as long as they stay above the level of 300 individuals, only if they keep receiving at least one reproducing immigrant every generation from Finland or Russia.²⁰⁹ Genetic viability is considered warranted above the MVP level of 300 wolves, at which the loss of genetic variability is below 5% in 100 years.²¹⁰ In this sense, Swedish wolves are seen as part of a larger meta-population that, gathering the different subpopulations, makes up for the necessarily higher effective population size of $N_e=500$. Thus, the influx of new blood into the Swedish subpopulation is seen as crucial for the ability of Sweden to consider their wolf population as a small fraction of a bigger meta-population. Otherwise, the Scandinavian population, shared with Norway, would have to be of at least 1700 individuals to reach FCS, according to SEPA.²¹¹ For the requirement of only 300 wolves in Sweden, SEPA decided to include the northern European population, i.e., including Norway, Finland, Russia, Baltic states and Poland.²¹² However, can FCS be measured including populations of other countries? And, if so, can they be non-EU countries as well? It is only logical to think that not every

²⁰⁶ Epstein 2016, p. 233.

²⁰⁷ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 8.

²⁰⁸ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 66.

²⁰⁹ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 7.

²¹⁰ Ibid., p. 9.

²¹¹ Ibid., p. 8.

²¹² Ibid., p. 9.

country can host numbers as high as those of, for example, 5000 individuals for every species of community interest, especially when we're talking about wide-ranging, low-density large carnivores. Moreover, political barriers don't necessarily follow the biologically defined ranges of transboundary populations. Therefore, as Laikre et al points out,

the population within a member state can maintain its genetic variation, and hence its long-term viability, if it is a part of a larger population or system of populations that in total has a large enough effective size.²¹³

However, if the genetic variability of a population is already so impoverished, the rule of thumb of 1 immigrant per generation which has been commonly used might have to be modified.²¹⁴

The EU Commission Guidelines seem to foresee the possibility to assess FCS, in certain situations, at transboundary level. In this sense, while the reports of Member States on their species' FCS shall be at the national level, joint assessments may be made when populations are shared with other Member States, such as is the case of the Pyrenean population of brown bear between France and Spain, or the Tatra chamois between Poland and Slovakia.²¹⁵ However, these assessments can be done if cooperation and common management exist between the countries, and the Commission goes on to name, for example, the case of large carnivores.²¹⁶ Thus, in order to assess if this is applicable to Sweden, one must answer if the case of the northern European wolf population is comparable, for example, to that of the Pyrenean bear, and if there is really a cooperative management between Sweden and all of the stated countries. Since not all of them are EU-members, it shall be noted that the EU Commission Guidelines foresee the possibility, when it is biologically relevant, to include into the consideration of FCS the populations from non-EU countries.²¹⁷ However, and since the assessment of FCS influences the capacity to derogate from strict protection, the CJEU has made it clear that, for the

²¹³ Laikre et al. 2009, p. 1379.

²¹⁴ Mills L.S., and Allendorf F.W., "The one migrant per generation rule in conservation and management" (1996) 6 *Conservation Biology*; quoted in Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 44–45.

²¹⁵ DG Environment 2017, p. 106.

²¹⁶ Ibid.

²¹⁷ Ibid.

assessment of the impact of derogations on the conservation status, it cannot be taken into account

the part of the natural range of the population in question extending to certain parts of the territory of a third country which is not bound by an obligation of strict protection of species of interest for the European Union.²¹⁸

Though Norway might qualify as a country bound by a similar obligation under the Bern Convention, this certainly wouldn't apply to Russia. Moreover, one thing is to include transboundary populations into the consideration of FCS, and another one is to rely on them to justify derogations.

As legal scholar Arie Trouwborst notes, the EU Commission has focused only on national populations in the infringement proceedings against Finland and Sweden, even though it has endorsed Guidelines that supported a transboundary approach.²¹⁹ Nonetheless, it is the CJEU who has the final say in these matters, and as of today, it has focused narrowly on national populations in the few occasions where it has had the opportunity to rule, even if indirectly, on this topic. In this sense, the CJEU rejected the inclusion of Russian populations for the consideration of Finnish wolves' FCS in the *Tapiola case*²²⁰ and in the *Hamster case*²²¹ it adopted an even narrower approach, by considering several populations of hamsters inside of France.²²² But, if it were the case that FCS could be considered at a transboundary level for certain populations such as those named by the EU Commission Guidelines, would that be the case of the Swedish wolf? Is the Fennoscandian population, therefore, comparable to that of the Pyrenean bear? According to natural scientist Guillaume Chapron, these are different situations and there lacks "biological basis to assume there is a functioning Fennoscandian wolf population".²²³ Moreover, he says, the Swedish wolf population is separated from the Finnish one by over 1000 km, and the attempts at natural connectivity have been everything but smooth.²²⁴ This is because Finnish wolves that attempt to migrate into

²¹⁸ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 60.

²¹⁹ Trouwborst 2014, p. 97.

²²⁰ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 60.

²²¹ C-383/09 *Commission v France*.

²²² Epstein et al. 2016, p. 83.

²²³ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 66.

²²⁴ *Ibid.*

Sweden must cross the Sami reindeer herding area, where protection hunting is likely to kill most wolves that set a foot on Swedish land.²²⁵

Thus, attempts at artificial translocations have been performed by Swedish authorities several times, but this entails several problems when such practices apply to territorial animals, since these repeatedly try to go back to where they settled. A paradigmatic case might be the so-called Junsele wolf, that had to be translocated three times from reindeer herding areas to central Sweden before it got lost and no one knew of her again.²²⁶ The translocation of immigrant individuals in order to meet the target of at least 1 immigrant per generation poses several legal questions as well: first, and as legal scholar Yaffa Epstein notes, a species may not be maintaining *itself* according to the wording of article 1(i) HD if its survival is wholly dependent on human assistance.²²⁷ Secondly, translocations imply a derogation from strict protection of article 12 HD, so that it would be, at least, legally bizarre that the survival of a species was dependent on the constant application of derogations from strict protection.²²⁸ However, it is based on this eventual connectivity that Sweden relies on the assessment of wolves' FCS, by considering the Swedish population as a small part of a bigger one through the constant influx of at least 1 effective individual per generation. It must be noted that efforts towards a cooperative approach are being made by Norway, Sweden and Finland with the framework for transboundary cooperation on management and conservation of wolves in Fennoscandia,²²⁹ but Finnish wolves that immigrate through northern Sweden still face a big risk of being killed.

Due to the government's categorization of Swedish wolves as having FCS in 2013, based on research that only accounted for demographic viability, the EU Commission manifested its opposition in the midst of the ongoing infringement procedure regarding Swedish wolf licensed hunting.²³⁰ Thus, in 2015, SEPA commissioned a group of researchers to assess what would be required for Swedish wolves to reach FCS under

²²⁵ Epstein 2016, p. 223.

²²⁶ Stenseke 2021, p. 257.

²²⁷ Epstein 2016, p. 236.

²²⁸ Ibid.; Article 12 HD prohibits *all forms of deliberate capture* (art. 12.1(a)) and the *deliberate disturbance* of the species (art. 12.1(b)), which is likely to be affected by a translocation.

²²⁹ Ministry of Agriculture and Forestry of Finland, Norwegian Environment Agency & Swedish Environmental Protection Agency (2020). *Framework for Transboundary Cooperation on Management and Conservation of Wolves in Fennoscandia*.

²³⁰ Epstein 2016, p. 224.

the Habitats Directive utilizing science-based criteria.²³¹ According to this new report, the bar was raised from the FRP set at 270 wolves plus 2,5 immigrant reproducing wolves per generation to the previously explained 300 wolves plus only 1 new migrant per generation.²³²

The latest report is arguably more exhaustive, since the 2013 report didn't give much freedom to the researchers for a thorough assessment. Indeed, the first report applied the parameters of IUCN criterion E, that is, what would be the number necessary for the wolves' population to have a risk of extinction below 10% for the next 100 years, if there were no genetic problems in the wolf population. Actually, even the author of such study questioned its appropriateness for the purpose of determining FCS for Swedish wolves, since it didn't even take into consideration other aspects required under the IUCN criterion and which were neglected in favor of a uniquely demographic assessment.²³³ The researchers from the 2015 report, belonging to two different research groups,²³⁴ were given a more open question, i.e., to provide an updated synthesis on appropriate science-based criteria for the Scandinavian wolf FCS, for which they didn't reach consensus in several aspects. However, they coincided in some elements: that FCS requires long-term genetic viability, and the rule of $N_e=500$ should be applied, that the inbreeding rate should be 0.2, that 200 for FRP is too small, and that human-assisted translocations should be avoided when possible in favor of natural immigrations.²³⁵ Since an exhaustive analysis of the different reports would exceed the limits of this thesis, the following lines will summarize the most relevant elements and what led SEPA to choose some opinions over the others in its final decision.

The opinion that was finally chosen by SEPA pertained to a subset of researchers which constituted the majority of the team (6 out of 8), who, regarding the political situation in Sweden, where wolves are deeply controversial, recommended setting FRP

²³¹ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*.

²³² *Ibid.*, p. 7.

²³³ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 64.

²³⁴ The two research groups were Professor Scott Mills and colleagues, from North Carolina State University, USA; and the research group SKANDULV, from Swedish University of Agricultural Sciences.

²³⁵ Liberg et al. 2015, *Joint statement by the experts commissioned by the Swedish Environmental Protection Agency to provide an updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 1.

at 300 wolves.²³⁶ They based their outcome on the following reasoning: first, FCS could be considered at transboundary level, in accordance with the LCIE Guidelines; secondly, a short-term MVP for genetic viability of 50 individuals was appropriate as long as the rule of one immigrant per generation was fulfilled. They translated the choice of $N_e=50$ into a total population of 170 individuals, and, since MVP is necessarily lower than FRP, they concluded a total of 340 individuals by doubling the MVP. Of these, 40 would be hosted by Norway, so Sweden would need 300 individuals in order to be in line with the requirements of FCS.²³⁷ A subset of the experts agreed on the need to include ecological viability apart from genetic and demographic, for which they set a quantitative threshold of 600 individuals, i.e., half of the population carrying capacity.²³⁸ From this subset, one team adopted a two-tier approach: while they admitted that Swedish wolves were at the moment not fulfilling their ecological role except in a part of Sweden, they recommended that FRP was granted now with several conditions, e.g. that the population was allowed to grow to 600 wolves and that controlled hunting was implemented in order to increase social tolerance. This two-step approach was based primarily on the need to avoid an increase of poaching, for which a first short-term goal would build the necessary trust to achieve the long-term goal of ecological viability at 600 wolves.²³⁹

However, only one researcher, Guillaume Chapron, diverged from the other researchers' tendency to consider political controversies for the setting of science-based criteria, and assessed FCS on pure scientific and legal grounds.²⁴⁰ According to him, not only the EU Commission 2011 Guidelines explicitly excluded non-scientific grounds from the FRV assessment, but, also, biodiversity conservation is in itself a political choice that was already realized when Sweden signed the HD and other international legislations.²⁴¹ Moreover, the CJEU has made it clear in previous rulings (e.g. C-371/98)

²³⁶ Ibid., p. 1, and Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 8 and 47.

²³⁷ Liberg et al. 2015, *Joint statement by the experts commissioned by the Swedish Environmental Protection Agency to provide an updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p.1.

²³⁸ Ibid., p. 2. Carrying capacity understood as the maximum load that the environment can take. Although this concept is used in population dynamics studies in the field of biology, it can also be applied to refer to the social carrying capacity, that is, the maximum load that a society can take, which was also explicitly considered in the study of Scott Mills and Feltner 2015, p. 22.

²³⁹ Scott Mills and Feltner 2015, p. 26-27.

²⁴⁰ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 63.

²⁴¹ Ibid.

that article 2(3) HD on social, economic and cultural requirements isn't an independent basis for derogation from protection.²⁴²

Thus, Chapron set four different scenarios based on whether it was allowed under the HD to include wolves from other countries. If Sweden couldn't rely on foreign wolves for its FCS assessment, which according to him, was the result of a strict interpretation of the CJEU case-law and the Commission guidelines, FCS would be reached at 1700 wolves. If such number was too high for Sweden, the number would be set at carrying capacity, preliminarily established at 1200 wolves. However, the author shed some doubts on such assumption (that 1700 wolves were too much for the Swedish territory) since Sweden hosted, at that moment, 2800 brown bears and 1000 lynx. If Sweden could include wolves from other countries for the FCS assessment, a preliminary estimate of 600 wolves would suffice as long as there was more than 1 effective individual immigrating per generation. If such connectivity was not feasible, and there was less than 1 effective immigrant per generation, FCS would be achieved at a number larger than 600 wolves, "large enough to have $N_e=500$ given the realized connectivity".²⁴³

Finally, SEPA chose to follow the reports that argued that FCS could be assessed at transboundary level, that ecological viability wasn't required under the HD and that the CJEU case-law wasn't applicable since it hadn't ruled directly on these topics.²⁴⁴ Some notes shall be said on SEPA's choice. Firstly, the assignment called for a *science-based* assessment of the FCS criteria, while only one researcher explicitly excluded sociopolitical considerations from its conclusions, precisely the one whose findings were rejected. The research that was finally followed by SEPA explicitly included political concerns to modulate an otherwise purely science-based outcome. When discussing the different interpretations adopted by the different researchers, they openly admitted that it was due to the flexible interpretation that the chosen group employed in order to give "more importance to the broader social context of the wolf question",²⁴⁵ while only Chapron relied on a strict interpretation of the HD.²⁴⁶ Moreover, it was indirectly

²⁴² E.g., C-371/98 *First Corporate Shipping*.

²⁴³ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 69.

²⁴⁴ Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 11–12.

²⁴⁵ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 8.

²⁴⁶ *Ibid.*

acknowledged that the chosen FRP was not in line with the precautionary principle, but that an application of such principle would lead to such a high FRP that it could have the opposite effect by raising social controversy and increasing poaching.²⁴⁷

This assignment was supposed to gather the science-based criteria necessary for SEPA to, afterwards, take a decision that considered other relevant factors, such as sociopolitical ones. But, by including these external elements from the beginning in the scientific report, sociopolitical factors were likely to be given more weight in detriment of scientific grounds. Thus, SEPA might have considered non-scientific factors twice, precluding scientific data from influencing the outcome in a more equitable manner.

3.3 Are licensed hunting policies in accordance with the Habitats Directive?

3.3.1 Rulings previous to 2016

Licensed hunting was reviewed by Swedish courts for the first time in 2013, although Sweden had been applying such policies since 2009. However, national procedural law denied standing to NGOs, so they couldn't resort to judicial review up until the CJEU jurisprudence broadened their locus standi.²⁴⁸ Therefore, the licensed hunt in 2013 was the first one that was assessed by the judiciary. It concerned 16 wolves, under the stated purpose of reducing inbreeding. It was appealed up to the Administrative Court of Appeal in Stockholm, whose rationale would later be followed by Swedish courts in the subsequent yearly cases concerning wolf licensed hunting decisions for several years.²⁴⁹

Firstly, the Court made clear that an aim had to be stated to justify a derogation under article 16.1(e), even though the literality of the article doesn't necessarily imply so.²⁵⁰ In this way, the Court found the purpose of reducing inbreeding to be valid, so that an assessment on expediency and proportionality had to be subsequently applied. Therefore, the Court analysed SEPA's research to justify the connection between the licensed hunt and the possibility of reducing inbreeding, and the conclusion was that it was not sufficiently proven that the hunt would be expedient, i.e., sufficiently connected

²⁴⁷ Ibid., p. 47.

²⁴⁸ Darpö 2016, p. 273-274.

²⁴⁹ Stenseke 2021, p. 273-274.

²⁵⁰ Judgement of the Stockholm Administrative Court of 2 May 2013, case 2428-13 and Judgment of the Stockholm Administrative Court of Appeal of 14 November 2014, case 3273-13, in Stenseke 2021, p. 272-273.

to the stated aim.²⁵¹ Secondly, SEPA's research didn't pass the proportionality test either, since there were doubts on the restrictive nature of the intended derogations.²⁵² Thus, the other specific requirements of article 16.1(e) weren't really scrutinized by the court. According to legal scholars Darpö and Epstein, the lack of assessment of other satisfactory measures was probably what made the purpose of reducing inbreeding look like a mere pretext.²⁵³ Indeed, if the government was really attempting to reduce inbreeding of the wolf population, and not to simply alleviate the pressure inflicted by hunters and farmers, it would've been more logical to start with an attempt at reintroducing unrelated specimens, and only if such measure hadn't been efficient, the selective hunt would've been considered.²⁵⁴

This was the rationale applied in the following cases, where some aims were deemed legitimate and others not, but the subsequent analysis on expediency and proportionality would most likely stop the hunts. To give some examples, in 2014 a decision on licensed hunting of 30 wolves was similarly overturned, in this case by the Stockholm Administrative Court, although here only one aim was considered appropriate under the Habitats Directive from the two that were proposed.²⁵⁵ The purpose of the 2014 licensed hunt was dual: on one hand, it was aimed at reducing the wolf population, and on the other hand, it was aimed at cushioning socio-economic consequences.²⁵⁶ Only the second purpose, i.e., to cushion socioeconomic consequences, was found legitimate under the Habitats Directive, something that has been repeatedly discarded by the CJEU as already explained. In this sense, not only article 2(3) on socioeconomic requirements can't be regarded as an independent basis for derogation, but any purpose put forward must be in line with the overall objective of the Habitats Directive to conserve biodiversity.²⁵⁷ However, this is not so relevant as of today, since the *Tapiola case* made it even more clear for the specific case of wolf licensed hunting and the courts have, ever since then, instrumentalized the purpose of cushioning socioeconomic consequences under the general aim to increase social acceptance for the predator in question.²⁵⁸ The

²⁵¹ Ibid., p. 275.

²⁵² Ibid., p. 276.

²⁵³ Darpö and Epstein 2014, p. 364

²⁵⁴ Ibid.

²⁵⁵ Decision of the Stockholm Administrative Court of 15 January 2014, case 30966-14 and 598-14, in Stenseke 2021, p. 277.

²⁵⁶ Stenseke 2021, p. 277.

²⁵⁷ EC (2021) 7301 final, p. 56 (3-40).

²⁵⁸ Stenseke 2021, p. 290.

court did quash the 2014 hunt, nonetheless, based on similar grounds as those previously followed by the Administrative Court of Appeal in Stockholm, i.e., lack of expediency and proportionality, the latter because this hunt regarded 30 wolves, so that, if 16 wolves had already not been considered proportional in the previous year ruling, 30 wolves could hardly be regarded as such.

The fact that, ever since ENGOs were granted standing, licensed hunting decisions were being annulled by the courts, on the grounds of its infringement of EU law, rose a lot of controversy, with hunting and farming stakeholders opposing what they perceived as a “threat to democracy”.²⁵⁹ The escalating social divide led the Government and the Swedish Parliament to change the instances of appeal. This change concerned the capacity to bring hunting decisions to the courts, so that they would only be appealable to SEPA and, thus, judicial review was off limits.²⁶⁰ Therefore, 44²⁶¹ wolves were killed in 2015 with NGOs unable to bring this matter to the courts. This exclusion of hunting decisions from judicial review was highly criticized by legal scholars for its probable illegality under EU law,²⁶² and it prompted a new infringement procedure from the EU Commission in July 2014.²⁶³ Logically, the HFD overturned the appeals ban as soon as it had a chance.²⁶⁴ This meant, however, that licensed hunting was likely to suffer the same fate once again on Swedish courts, spurring further social controversy. Thus, the Parliament decided, this time, to simply change the competent court in wolf matters from the Stockholm Administrative Court to Luleå. This decision was based, among other reasons, on the manifested preference of certain stakeholders, such as the Swedish hunting association, the CAB of Orebrö or the Sami Counsel, for a court situated in an area with many large carnivores, even though wolves aren’t among them.²⁶⁵ However, before such decision was taken, NGOs had already started to appeal the new licensed hunting decisions adopted by the CABs, which were, in the meantime, appealed to four different courts, although they seemed to follow the same fate of the previous ones: their compliance with EU law was dubious under the eyes of the judiciary. Surprisingly, Värmland county’s licensed hunting was appealed and made it to the Supreme

²⁵⁹ Darpö 2016, p. 274.

²⁶⁰ Ibid., p. 274-275.

²⁶¹ Stenseke 2021, p. 280–281 says that 44 wolves were killed, while Darpö 2016, p. 6 says that there were 42 wolves.

²⁶² Darpö and Epstein 2015, p.19.

²⁶³ Darpö 2016, p. 275.

²⁶⁴ Stenseke 2021, p. 281.

²⁶⁵ Stenseke 2021, p. 282–283.

Administrative Court, which was the first time that licensed hunting would be assessed by the HFD.²⁶⁶ However, in the meantime of this process, the 2017 licensed hunt had been already appealed and was brought to the Luleå court for the first time.

3.3.2 *Rulings after 2016*

The Luleå ruling changed the paradigm of what had been the general line in Swedish jurisprudence: though stated aims were sometimes seen as compatible with the HD, an exam on expediency and proportionality would most likely quash licensed hunting, based on the careful examination of SEPA's and CAB's reports. In the upcoming years, though, a different line would be followed, which started with this ruling: for the first time, SEPA's reports were regarded more as "mere formalities",²⁶⁷ rather than as documentary proof that required the scrutinization of the tribunal to check every detail of SEPA's reports. In the words of the court, "The administrative court finds that the guidelines provided by the environmental agencies in these issues have to be the base for the assessment".²⁶⁸ This is problematic, since SEPA is supposed to have the burden of proof,²⁶⁹ and, as it was previously noted in Chapter 3.2, it exercised a great deal of discretion in its selection of some researchers' opinions over others. In this sense, Luleå court based the credibility of SEPA's reports on the fact that they were made by qualified researchers, so they represented the available science.²⁷⁰ As has been previously explained, only one researcher made an assessment based on pure scientific and legal grounds, and SEPA didn't choose those results. Rather, SEPA chose to follow the results of a subset of researchers that openly admitted that their research was modulated by the sociopolitical circumstances, so that when the court regarded SEPA's reports as *the base for the assessment* without scrutinizing the expediency and proportionality of the decisions, like previous courts had been doing, it actually shielded a discretionary administrative decision as representing best available science.

The HFD's ruling came a month later and, based on the fact that it followed the same line of argumentation as Luleå's ruling, which is highly divergent from the previous

²⁶⁶ Before, it had assessed licensed hunting but mainly in what relates to access to justice, so this was the first time that licensed hunting would be assessed in its substance. To know more about the HFD's ruling on the appeals ban, see Darpö 2016.

²⁶⁷ Stenseke 2021, p. 285.

²⁶⁸ Judgement of the Luleå Administrative Court (Förvaltningsrätten i Luleå) of 22 November 2016, case 2153-16. Translation of Stenseke 2021, in p. 285–286.

²⁶⁹ C-342/02 *Commission v Finland*, para 25, and C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 30.

²⁷⁰ Stenseke 2021, p. 285.

existing case-law, it seems that it was deeply influenced by this shift in interpretation. First of all, the HFD changed the order of analysis: while previous courts had started with an examination on expediency and proportionality of the aims, i.e. lack of another satisfactory alternative, the HFD relegated such assessment to the end, and initiated its assessment by wondering if the hunt wouldn't be detrimental for the maintenance of FCS. In this sense, a literal reading of article 16 suggests that the previous courts did follow a more logical order, since the lack of satisfactory alternatives is the first, rather than the last, stated requirement, although this change of order was necessary for the HFD to draw its conclusions, since it assessed the compliance of the other requirements in reference to wolves' FCS.

Thus, regarding this first element, i.e., that the measure is not detrimental to the maintenance of FCS, SEPA's report was pivotal. Since the latest inventory showed a total of 415 individuals in Sweden, including a genetically valuable couple (the so-called Tiveden couple), which could, either them or its offspring, reproduce with Scandinavian wolves, SEPA and the CABs considered that the hunt wouldn't be detrimental as long as it stayed within the limits drawn by the above-mentioned SEPA's 2015 report. In this sense, as long as the measure maintained the minimum of 300 wolves, plus a guaranteed input of new blood every five years, the licensed hunt wouldn't affect the FCS. The Swedish Society for Nature Conservation, alongside other NGOs involved in the process, raised the question about the lack of unanimity in SEPA's reports, since not all researchers reached the same conclusion, and it was SEPA who had to finally pick a specific opinion from the available ones. Moreover, if SEPA's report was to be followed, then, at least 1 immigrant per generation would have had to reproduce in the last five years for the Swedish wolf to have FCS, according to their own logic. However, not only that hadn't happened since 2008, but the likelihood of the Tiveden couple or its offspring doing so in the next five years was anything but guaranteed. In this sense, the Tiveden couple had had 9 puppies, from which 7, at least, had died either through protective hunting or in traffic accidents. Additionally, the probability of immigrants adding to the genetic pool of the Scandinavian pool was, based on previous experience, very low. In this sense, the NGOs reminded the Court that, from the 19 wolves that had immigrated since 2000, only two had successfully reproduced with the Scandinavian population. Therefore,

favourable conservation status cannot be based on a hope or vague assumption that the necessary genetic supplementation may take place, especially when it has not done so in the last five years.²⁷¹

Against this backdrop, the HFD ruled the following: first, about the lack of unanimity in SEPA's report, it merely answered that "the Supreme Administrative Court has no reason to question the scientific basis on which the Swedish Environmental Protection Agency has based its assessment".²⁷² However, this doesn't seem to answer to the NGOs claims, since they weren't questioning the scientific basis of the reports, but rather the political decision taken by SEPA based on such reports, by choosing some of them in detriment of others. However, this sparse answer was all they said in this respect. The HFD was also asked about the uncertainty connected to the actual size of the wolf population and the impact that the hunt might have on it, for which the Court acknowledged that calculations always entail a degree of uncertainty, but that in this case, the margin of uncertainty was appropriate.²⁷³ Since an acceptance of the criteria in SEPA's report led to doubts on whether the wolf had, at the moment, FCS, given the past record of wolf reproductions in Sweden and the high mortality of the Tiveden couple's offspring, the HFD answered that the reproduction rates of the last 5 years didn't imply a lack of FCS, and that "the Supreme Administrative Court finds no basis for rejecting the assessment of favourable conservation status that the Swedish Environmental Protection Agency has made".²⁷⁴ Despite these scant explanations without delving too much into SEPA's reports, the Court did enter into more technical matters when it mentioned the increasing trend of the wolf population as an element to consider for the assessment of the conservation status, along with the genetic status of the wolf. Regarding the former, i.e., the increasing population trend, it shall be noted, despite the Court's argumentation, that one of the researchers commissioned by SEPA had already warned about the dangers of confusing trends with results, since a species can have an increasing trend but still be far away from a good result, that is, FCS.²⁷⁵

²⁷¹ HFD 2016 ref. 89, p. 14. My trans.

²⁷² Ibid., p. 15. My trans.

²⁷³ Ibid., p. 15.

²⁷⁴ Ibid., p. 16. My trans.

²⁷⁵ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 68. However, the researcher here referred to the coefficient inbreedings: "It is important to make a difference between a trend and a result: the fact that inbreeding coefficient may be declining (a trend) does not equal this coefficient passing below 0.2 (a result). Therefore, wolves in Sweden can never be said to have achieved FCS as long

The Court then went on to assess the next requirement, i.e., the appropriateness of the hunt in relation to the size and composition, which, in theory, equates to the *limited numbers* and *limited extent* required in article 16.1(e). Here, the NGOs complained on the method used to examine the limited numbers, which consisted of assessing the genetic status and increasing trend of the species. According to them, and based on the guidance of the EU Commission, it was the number, rather than the growth rate, that had to be the focus of such assessment.²⁷⁶ This not only makes sense according to the above-mentioned researcher’s judgement, which warned on the differences between trends (increasing) and results (specific numbers that account for FCS), but also from a logical point of view: if it is growth rather than population number what matters, then, only hunting a population with a decreasing trend (a population that was actually diminishing) would be considered not limited enough in numbers. Moreover, the NGOs argued that the CJEU had ruled on the meaning of “small numbers” as required in the exceptions provision of article 9.1(c) of the Birds Directive, according to which small numbers could not exceed 1% of the population.²⁷⁷

The HFD discarded the appropriateness of the CJEU’s ruling for the case at hand, since article 16.1(e) talked about *limited numbers* rather than *small numbers*. However, it must be noted that the Stockholm Administrative Court had already used that parallelism with the concept of small numbers in its 2013 ruling.²⁷⁸ Indeed, years ago, the EU Commission had already argued in the infringement procedure against Sweden the relevance of the *small numbers* precedent in the Birds Directive, with the same answer by the Swedish Government, rejecting such comparison.²⁷⁹ Moreover, the appropriateness of the transposition under Swedish law of the requirement for limitation is questionable, as has been previously explained in Chapter 3.1: the Hunting Regulation 23 c, instead of limited numbers and a limited extent, requires appropriateness in relation to the size and composition of the population. The Swedish transposition implies a lower degree of constraint than the limited numbers and limited extent requirement, since the latter is not openly dependent on the status of the species in order to modulate its

as their inbreeding coefficient remain >0.2 and substantial number of immigrant wolves is required to reduce the inbreeding coefficient.”

²⁷⁶ HFD 2016 ref. 89, p. 18.

²⁷⁷ C-344/03 *Commission v Finland*, paras 53–54.

²⁷⁸ Darpö and Epstein 2014, p. 365–366.

²⁷⁹ Darpö 2011, p. 12.

restrictive approach. In this sense, and as Darpö puts it, “the fact that the total number of wolves remains unchanged does not in itself mean that the amount of animals killed is limited”.²⁸⁰ Nonetheless, the HFD decided to extract the meaning of limited numbers from the *Finnish wolf case*, where the CJEU said that

it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range.²⁸¹

From this, the HFD interpreted that the hunt would be limited in numbers if it didn't affect Swedish wolves' FCS.²⁸² However, some elements shall be highlighted from the HFD's reasoning: first, the *Finnish wolf case* regarded another letter of article 16, that is, letter (b), which doesn't even require limited numbers in its wording, and the extracted paragraph of the judgement wasn't even answering to the question of *what* limited numbers are, but was merely stating that, *whatever* limited numbers might be, these wouldn't necessarily have to affect the FCS of the species. Indeed, this ruling was dealing with the question of whether protective hunting could take place if a population hadn't reached FCS, and it only mentioned article 16.1(a) to (c).²⁸³ Moreover, the latest piece of guidance from the EU Commission on strict protection of species elaborates on the concept of limited numbers of letter (e) by distinguishing this letter from (a)-(d). In this sense, while all derogations are bound by the requirement of not being detrimental to the maintenance of FCS, letter (e) adds, on top of it, that the numbers are limited, which, in the words of the Commission, “suggests that the legislator intended a greater level of constraint”.²⁸⁴ However, the HFD interpreted the concept of limited numbers as entailing the same as the previously assessed element: that the measure is not detrimental to FCS. It is logical to think that, if limited numbers were to be assessed in this way, then the legislator wouldn't even have included this extra requirement in letter (e), since it would already have been addressed by the general prohibition of any derogation not being detrimental to the maintenance of FCS.

²⁸⁰ Darpö and Epstein 2014, p. 366.

²⁸¹ C-342/02 *Commission v Finland*, para 29.

²⁸² HFD 2016 ref. 89, p. 19–20.

²⁸³ Darpö 2011, p. 10.

²⁸⁴ EC (2021) 7301 final, p. 58 (3-43).

The HFD continued the assessment by stating that the requirement of strictly controlled conditions and the requirement of selectiveness were as well fulfilled, and, for the requirement of the hunt being selective, it agreed with the reasoning of both the CABs and SEPA which proved that licensed hunts were limited to areas where there were no genetically valuable individuals. Finally, the HFD went on to assess the one element that had been examined by the previous courts and which, since it hadn't been found in compliance with the HD, precluded a further analysis of the previously explained elements: the lack of any other satisfactory alternative. This point constituted the largest part of the judgement, occupying 10 pages out of the 35 of the ruling.

First, though, they had to assess the suitability of the hunt's purpose under the Habitats Directive lens. In this sense, the Court considered that the objective of reducing socio-economic interests was an aim per se, not subjugated to the overall objective of species protection of the HD.²⁸⁵ Therefore, the purpose of limiting socio-economic consequences and "improving the possibilities for keeping of domestic animals"²⁸⁶ (mostly sheep herding and moose hunting) was considered in line with the Directive in itself, although the potential of such measures for improving social tolerance was nevertheless analyzed by the Court. The appealed ruling of the administrative court had emphasized the importance of a restrictive interpretation in accordance with the jurisprudence of the CJEU, as well as with the principle of proportionality that links the derogation with the alleged objectives it aims to achieve. The administrative court had analyzed the expediency of the measure by assessing whether such derogation was needed in the light of the reasons being claimed. In this sense, it was mainly the problems related to sheep herding and with moose hunting that were being utilized for the justification of the hunt, so the court analyzed the reports presented on behalf of the parties. Here, the court had noted that the places proposed for the hunt weren't precisely those where sheep herding was mainly taking place, and neither there had been wolf attacks claimed by the authorities. Moreover, the sheep industry was, in an overall assessment, showing a positive trend.²⁸⁷

Regarding moose hunting, wolves are said to be a competition for hunters since they eat moose as well, and the Nordic practice of hunting with loose dogs is hindered by

²⁸⁵ Stenseke 2021, p. 288–289.

²⁸⁶ HFD 2016 ref. 89, p. 17. My trans.

²⁸⁷ HFD 2016 ref. 89, p. 28-29, on the findings of the Administrative Court's appealed judgment.

the threat of stray dogs being attacked by wolves. The administrative court had noted, in this respect, that it was in the nature of moose hunting that some risk would have to be assumed,²⁸⁸ even more when releasing dogs in the wild. Moreover, it's obvious that moose will also be hunted by wolves, since they constitute part of their diet. However, regarding the alleged reduced prices of hunting leases, the court didn't see a reduction of the prices in the county, since they even noticed an increase.²⁸⁹ The administrative court had then analyzed the possibilities of licensed hunting to increase social acceptance, for which it noted that, based on SEPA's report,

research on the impact of wolf occurrence on people's everyday lives, such as e.g. well-being, health and quality of life are still in their infancy. In the report, therefore, no conclusions have been drawn based on the current state of knowledge.²⁹⁰

The researcher that drew these conclusions in the report, also cited several peer-reviewed scientific papers that showed a decrease in social acceptance due to licensed hunting, and concluded that trying to reduce poaching by reducing the population size was incompatible with reaching FCS.²⁹¹ Thus, the measure hadn't passed the expediency exam, since a clear connection between the hunt and the purposes it aimed to achieve was not found. Additionally, the culling of the 11% of the population of wolves, which constituted an even larger percentage in Värmland county, was considered too large. Therefore, the hunt was not considered proportionate either.²⁹²

The NGOs used additional arguments to support their grounds. They focused primarily on the importance of the burden of proof, for which they relied, precisely, on the CJEU *Finnish wolf case*, whose interpretation on limited numbers had just been used by the HFD to find the hunt limited enough. In here, the NGOs insisted on the concept of proportionality, so that "the greater the deviation from the main rule of strict protection, the higher the requirements for evidence".²⁹³ Indeed, the *Finnish wolf case* emphasized the importance of a strict interpretation of the Directive.²⁹⁴ Therefore, the burden of proof to show that the cull of 11% of the wolf population, in the light of the conflicting scientific

²⁸⁸ Ibid., p. 29.

²⁸⁹ Ibid.

²⁹⁰ Ibid. My trans.

²⁹¹ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 65.

²⁹² HFD 2016 ref. 89, p. 29–30.

²⁹³ Ibid., p. 30.

²⁹⁴ C-342/02 *Commission v Finland*, para 25.

evidence presented, would have the *intended effect*, had to be raised very high.²⁹⁵ Finally, the NGOs argued that other satisfactory alternatives hadn't been assessed, since only other derogations of strict protection, such as translocations or sterilizations, had been considered by the authorities. In this sense, the NGOs named some unassessed alternatives, such as changing routines in protection hunting, adapting moose hunting practices, and preventative measures to protect dogs and livestock. Against this backdrop, the HFD ruled the following:

On the issue of whether there were other satisfactory alternatives, the HFD relied on the judgement of case C-76/08 (the *Malta case*), concerning the Birds Directive and article 9.1(c)'s derogation.²⁹⁶ This case involved a game species, included in Annex II of the Birds Directive, which would equate to Habitats Directive's Annex V. Here, the CJEU had to assess whether the bird species could be hunted out of its usual hunting period. In this respect, the Court stated that the term *other appropriate solution* wasn't supposed to be applied as soon as there was any other possibility to hunt such species during its allowed hunting seasons under article 7 of the Birds Directive, but rather, this term was meant to reach a balance between the protection of species and the leisure activities sought by the Birds Directive.²⁹⁷ From this, the HFD concluded that

In the opinion of the Supreme Administrative Court, it follows from (the Malta case) that when applying article 16(1) of the Species and Habitats Directive, it must be ensured that there is a balance between species protection and certain other interests. These interests are set out in article 2(3) of the Directive [...]. In assessing the necessity of licensed hunting, the interests set out in article 2(3) of the Directive must therefore also be taken into account in such a way that the balance between species protection and those interests is not lost.²⁹⁸

The appropriateness of this CJEU ruling for the case of the Swedish wolf is questionable for several reasons. First, this decision entailed a game species, included in Annex II under the Birds Directive, which is categorized as such "owing to their population level, geographical distribution and reproductive rate throughout the Community."²⁹⁹ Likewise, Annex IV species under the Habitats Directive are categorized as in need of strict

²⁹⁵ HFD 2016 ref. 89, p. 31.

²⁹⁶ *Ibid.*, p. 33–34.

²⁹⁷ *Ibid.*, p. 33.

²⁹⁸ *Ibid.*, p. 34. My trans.

²⁹⁹ Art. 7 of the BD.

protection due to their particular ecological situations. Moreover, the wolf is highlighted with an asterisk due to its specific risk as an endangered species.³⁰⁰ Also, if the matter here was whether article 2(3) can balance the strict protection regime of the HD, then the CJEU in case C-371/98 had already addressed this question explicitly, which, moreover, dealt directly with the HD. Here, the Court was asked if a Member State could consider article 2(3) when fulfilling its requirements under article 4(1) on habitats protection. The CJEU answered that a Member state

may not take account of economic, social and cultural requirements or regional and local characteristics, as mentioned in Article 2(3) of that directive, when selecting and defining the boundaries of the sites to be proposed to the Commission as eligible for identification as sites of Community importance.³⁰¹

Actually, the HFD had already rejected to establish a parallelism between the interpretation given of article 9 BD on *small numbers* and article 16.1(e) HD on *limited numbers*, even though they both dealt with the derogation from strict protection under almost identical terms.³⁰² Moreover, case C-371/98 as a ground to reject article 2(3) as an independent basis for derogation was also mentioned by one researcher in SEPA's report.³⁰³ Any of these reasons leads to the conclusion that Case C-371/98 is more connected to the question at hand in here than the *Malta case*, which dealt with a game species. Moreover, case C-182/02 of the Birds Directive has also been mentioned by the EU Commission Guidance as providing basis for a stricter assessment of the absence of alternative solutions, which precludes an alternative from being discarded on the grounds that the beneficiaries would have to alter their behaviour,³⁰⁴ even though this case concerned an Appendix II bird species as well. Additionally, the previously mentioned Opinion of the Advocate General in C-10/96, also mentioned by the Commission in

³⁰⁰ Art. 1(g)(i) and 1(h) of HD.

³⁰¹ C-371/98 *First Corporate Shipping*, para 25.

³⁰² 9.1(c) BD: "to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers"; Article 16.1(e) HD: "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". HFD 2016 ref. 89, p. 19.

³⁰³ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 63.

³⁰⁴ EC 2021 7301 final, p. 63 (3-60).

relation to the HD, established that traditions were not an excuse to derogate from strict protection.³⁰⁵

Nevertheless, since article 2(3) was considered as a valid reason to derogate, the HFD went on to assess the expediency of the hunt to achieve the purposes of reducing socioeconomic consequences. Regarding this point, the HFD didn't really assess the connection between the licensed hunt and the purposes at hand, but rather deviated the reasoning to whether or not wolves were affecting moose hunting and sheep herding, for which it did analyze parties' reports in more detail. However, when it was the time to connect such socioeconomic consequences to the usefulness of the licensed hunt, all it said was that

the Supreme Administrative Court has no reason to question the County Administrative Board's assessment of the specified local conditions, that licensed hunting can reduce both the conflict between humans and wolves and human concern and increase acceptance of the wolf and game management and in the long run reduce illegal hunting. Against this background, the Supreme Administrative Court considers that the decided license hunt could have been sufficiently expected to achieve the stated objectives.³⁰⁶

In the words of legal scholar Stenseke, G., "it is notable that HFD reaches these conclusions about the connection between licensed hunting, acceptance and illegal hunting seemingly without direct reference to research".³⁰⁷

About other suitable solutions, the HFD considered that, "[g]iven the purpose of the hunt", the ones proposed by the NGOs wouldn't have had "sufficiently general and effective effects".³⁰⁸ This doesn't mean, though, that these shouldn't first be given a try if there is a chance that they will alleviate the problem. According to the EU Commission guidance,³⁰⁹ if other solutions can partially help to solve the issue, these should be tried before resorting to a derogation from strict protection. Only then, if there is still a part of the problem unsolved, a new proportionality assessment should be made, this time comparing the remaining part of the issue with the effects of the derogation on the HD's objective.³¹⁰ This could've been definitely applied to the case of hunting with loose dogs,

³⁰⁵ C-10/96 Opinion of Advocate General Fennelly in *LRBPO and AVES v Région Wallonne*, para 36.

³⁰⁶ HFD 2016 ref. 89, p. 35. My trans.

³⁰⁷ Stenseke 2021, p. 288.

³⁰⁸ HFD 2016 ref. 89, p. 35. My trans.

³⁰⁹ EC (2021)7301 (n 104) 62.

³¹⁰ *Ibid.*

since there is already case-law from the CJEU that acknowledges that traditions aren't per se sufficient grounds to derogate from strict protection, and thus, that some practices will obviously have to adapt for the goal of biodiversity conservation.³¹¹ Finally, the HFD considered the proportionality of the hunt by referring to the previously analyzed elements, so that it would be proportional as long as it was performed under strictly supervised conditions, it was selective and in accordance to the size and composition of the population. Thus, it would as well be proportionate to the objective pursued by the derogation.³¹²

The HFD ruling set a strong precedent for courts to adopt a more ritualistic approach towards SEPA and CAB's scientific evidence, by which all they had to do was to check if such reports were signed by qualified researchers in order to, at least in theory, discard arbitrariness, and later to make sure that the level of 300 individuals was being complied by the yearly hunts. Therefore, the trajectory followed until before Luleå's ruling, of impeding licensed hunts based on a scrutinization of the scientific evidence provided by both parties, changed in favor of a more bureaucratic approach by the Courts, which contributed to relegate legal proceedings to "a smaller role in the wolf conflicts".³¹³ This approach, however, might have had an influence in how SEPA's minimum levels of 300 individuals ended up becoming a reality just one year later. In this sense, in 2018 Luleå Court upheld the licensed hunting decisions of 22 wolves, based on its own previous judgement and the HFD's precedent. In 2019 and 2020, however, no licensed hunting could take place since the population was at approximately 300 individuals. Thus, it seems that the use of article 16.1(e) preceded a reduction in wolf populations, which has some parallelisms with the case of the Swedish bear or the Finnish wolf, all of which have suffered a decrease in numbers, partly due to the (over)use of this derogation ground.³¹⁴

3.3.3 *Rulings after the Tapiola case*

In 2020, wolf populations were considered ready again for another licensed hunt, so that a hunt of 27 wolves in 2021 was issued, which was appealed to Luleå's court and

³¹¹ C-10/96 Opinion of Advocate General Fennelly in *LRBPO and AVES v Région Wallonne*.

³¹² HFD 2016 ref. 89, p. 35.

³¹³ Stenseke 2021, p. 292.

³¹⁴ Epstein et al. 2019, p. 3.

found in accordance with EU and Swedish law.³¹⁵ Some notes shall be drawn before explaining the judgement, since the CJEU had just issued the *Case Tapiola case*, a preliminary ruling that dealt specifically with wolf hunting in neighboring Finland under article 16.1(e) as previously explained. This ruling modulated the outcome of the 2021 Luleå’s ruling in as much as it required the above-mentioned objectives of cushioning socioeconomic consequences, to be subjugated to the aim of maintaining or restoring FCS.³¹⁶ Therefore, the prevention of poaching and increased social acceptance was now utilized to justify the licensed hunt.³¹⁷ However, the CJEU was very explicit in that it was not enough with a mere statement of purposes, but these had to be backed by “supporting evidence”³¹⁸ and “rigorous scientific data, including, where appropriate, comparative data on the effects of hunting for population management purposes on the conservation status of wolves”.³¹⁹ Moreover, the licensed hunt would need to have a net positive effect,³²⁰ something that the CJEU didn’t see fulfilled in the Finnish case at hand.³²¹ Finally, the CJEU also warned that the mere existence of an illegal activity couldn’t justify the derogation from strict protection, since in that case, the strengthening of monitoring and compliance mechanisms had to be prioritized.³²² Thus, the absence of other satisfactory alternatives had to be clearly proved. In the *Tapiola case*, the Court didn’t see that the Finnish government had really assessed such alternatives.³²³

Against this backdrop, Luleå’s ruling referred repeatedly to the *Tapiola case*.³²⁴ Nonetheless, the outcome was the same as the one of the HFD, since the hunt was deemed to benefit the social acceptance of the predator and it didn’t affect FCS since it wouldn’t lower the minimum level for FCS set by SEPA and endorsed by the HFD. However, the apparent assumption of a connection between licensed hunting and social acceptance by Swedish courts doesn’t seem to be grounded on the amount of evidence required by the CJEU in the *Tapiola case*. In this sense, it is questionable if the rationale followed ever since the HFD ruling on this matter by Swedish courts would have passed the test of the

³¹⁵ Judgement of the Luleå Administrative Court of 15 December 2020, case 2229-20; in Stenseke 2021, p. 290.

³¹⁶ C-674/17 *Luonnonsuojeluyhdistys Tapiola*, para 43.

³¹⁷ *Ibid.*

³¹⁸ *Ibid.*, para 41.

³¹⁹ *Ibid.*, para 45.

³²⁰ *Ibid.*

³²¹ *Ibid.*, para 65.

³²² *Ibid.*, para 48.

³²³ *Ibid.*

³²⁴ Stenseke 2021, p. 290.

CJEU, which demands for rigorous scientific data and, moreover, for an assessment under the precautionary principle, so that, in the face of uncertainty, precaution is prioritized. Since the scientific evidence supporting the connection between licensed hunting and social acceptance is conflicting,³²⁵ and since the courts haven't really delved into this issue because all they've claimed in this respect is that SEPA's reports are developed by qualified researchers (although one of the researchers considered the licensed hunt incompatible with the objective of reaching FCS³²⁶), this assumption is probably at odds with the jurisprudence of the CJEU. It is indeed strange that, after a case such as *Tapiola*, the outcome kept being the same as it had been for the past years. As previously shown, the political dimension of the wolf issue in Sweden has been trying to influence the judiciary for years, first with the appeals ban enacted by the Government, and later, with the change of judicial competence to the Administrative Court of Luleå because it was preferred by certain stakeholders.³²⁷ In this sense, it is no wonder that the outcomes might be the same and legal arguments seem to be bent in order to fit pre-established decisions. As legal scholar Stenseke notes, the wolf issue is much bigger than its legal dimension, but courts are forced to reduce such conflict to a legal reasoning, and in doing so, they "juridify the discourse, hide the political struggles, and veil the arbitrariness of its solutions".³²⁸

The latest news on the Swedish wolf issue came by during the final stage of this thesis, but it's important to include them in order to illustrate the scope of the controversy. On May 18th, the Riksdag's Committee on environment and agriculture agreed, by majority, on the reduction of the minimum number of wolves from 300 individuals to 170–270. These numbers are based on the 2013 report commissioned by SEPA to the group of researchers Skanduly, which applied IUCN criterion E. This assignment consisted in the following:

Conduct a quantitative (demographic only) viability analysis for wolves in Sweden. The viability analysis will clarify what is the minimum viable population of wolves based on the IUCN criterion E. The analysis shall be based on the most up-to-date scientific

³²⁵ Chapron and Treves 2016, p.

³²⁶ Liberg et al. 2015, *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population*, p. 65.

³²⁷ Stenseke 2021, p. 282–283.

³²⁸ *Ibid.*, p. 302.

knowledge of the Scandinavian wolf population, and under the assumption that genetic issues have been resolved.³²⁹

Thus, the requirements of FCS were clearly unfulfilled, since not even genetic aspects were considered. Indeed, the authors warned this repeatedly along the assignment: that the result was not to be confused with a complete assessment of the situation of the Scandinavian wolf, which, for starters, hadn't even solved the genetic problems.³³⁰ Because genetic aspects weren't resolved and because FCS is necessarily higher than MVP, SEPA had set the Favourable Reference Value between 170 and 270 wolves.³³¹ From this margin, SEPA chose the final number at 270 plus 2.5 reproducing immigrants per generation, as explained in Chapter 3.2, before the latest and more comprehensive report in 2015. Indeed, the 2013 report didn't include the qualitative elements required by the EU Commission Guidelines, and ecological viability wasn't assessed (although it wasn't included in 2015 SEPA's decision either³³²). It was, certainly, only about demographic viability.

The decision of the Riksdag lowers the number of individuals even more: although they've decided to go back to the previous margins of 170–270 wolves, they want to keep the number closer to 170 individuals, due to the increased density in the Swedish wolf population.³³³ It remains to be seen how SEPA will proceed. If SEPA issues new reports justifying these lower levels, it will also be interesting to see how the Courts will react when NGOs bring the licensed hunts under their review. Will the courts follow the HFD's approach, merely checking if SEPA has relied on qualified researchers, or will they readopt the approach of previous rulings, that assessed the scientific basis of SEPA's reports in more detail? The latter approach would definitely be more honest, since these levels aren't decided by scientists, but rather by politicians, and scientists are merely required to justify afterwards their decisions using the available science. In the meanwhile, doubts remain on the still-opened infringement proceeding of the EU Commission against Sweden, which is, up to this day, still unfolding.

³²⁹ Chapron et al. 2012, p. 9.

³³⁰ Ibid., p. 41.

³³¹ Epstein 2016, p. 231.

³³² Naturvårdsverket 2015, *Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg*, p. 12.

³³³ Sveriges Riksdag, "Naturvård och biologisk mångfald" (18 May 2022).

<https://www.riksdagen.se/sv/dokument-lagar/arende/betankande/naturvard-och-biologisk-mangfald_H901MJU24>.

3.4 EU Commission infringement procedure

As mentioned before, the EU Commission has an infringement procedure against Sweden for its licensed hunting policies, which has been ongoing for over twelve years. The latest news on its development were received in March 2019, when the Commission said that it was looking forward to seeing what Sweden would do in 2020, since no licensed hunting had taken place in 2019 due to the decrease in the wolves' population. However, licensed hunting was resumed and there are no signs that the Commission is taking further action.

It all started in January 2010, when four ENGOs wrote a complaint to the EU Commission on the basis that Sweden's licensed hunting policies were in breach of the Habitats Directive. The complaint was structured in three main points: that licensed hunting infringed article 12 and 16 of the Habitats Directive, that the permanent exclusion of wolves from the reindeer herding areas breached article 12 HD, and that, since the legislation on access to justice hadn't been amended yet at that moment, Sweden was in breach of the Aarhus convention and the principle of effectiveness.³³⁴ For obvious reasons, only the first element, that is, licensed hunting under the HD, will be assessed in the following lines. In June 2010, the Commission sent an initial letter to Sweden, followed by communications until, in December of the same year, the Commission sent a summary stating that Swedish licensed hunting policies were in breach of the Habitats Directive.³³⁵ For this reason, the Commission asked the government to stop the intended licensed hunt that was supposed to take place in 2011.³³⁶ Indeed, a licensed hunt of 20 wolves was established for 2011, which was nevertheless applied, just one week after the Commission's request.³³⁷ The Ministry of the environment answered the Commission with the back-up of a statement from the LCIE, which endorsed the intended licensed hunt, its compliance with the HD and its utility to indeed increase social acceptance. Interestingly, and as Darpö notes, the LCIE document was elaborated by ecologists, not by jurists or sociologists, and the lack of proper justification of their conclusions should be regarded as nothing more than a loose opinion.³³⁸ In the face of Sweden's disregard for the Commission's request to paralyze the scheduled hunt, in January 2011 the

³³⁴ Darpö and Epstein 2014, p. 354-355.

³³⁵ *Ibid.*, p. 355.

³³⁶ *Ibid.*

³³⁷ *Ibid.*

³³⁸ *Ibid.*, p. 362.

Commission sent a letter of formal notice, and a subsequent reasoned opinion in June 2011. The Commission's grounds revolved mainly around article 12 and the derogations of 16.1(e) HD, the population ceiling at which wolves were kept at a minimum in the country, and the genetic status of the species, whose dependence relied on the introduction of new specimens. The Commission also foresaw the risk of this flawed interpretation of the HD leading to a "multiannual practice of similar decisions in the future".³³⁹

In front of the new panorama, with an infringement procedure open by the EU Commission, the Swedish government decided to stop the hunt for 2012. However, the government had no qualms in openly admitting to the press that such decision was only to "circumvent the legal action from Brussels", so that this would only be temporary.³⁴⁰ Be that as it may, the population ceiling of 210 wolves that Sweden was applying on wolves and the 2012 licensed hunt were stopped. However, and as legal scholar Darpö warned, the government expanded the grounds for protective hunting and, thus, tried to find another subterfuge to continue practice as usual. Indeed, he goes on to say, the confinement of the EU Commission's action to article 16.1(e) might as well have been a "tactical mistake",³⁴¹ since protective hunting is being applied in an excessive manner and with the support of broad-phrased provisions.³⁴² Nevertheless, licensed hunting had a short break: in 2013, due to the pressure of hunters and farmers, the Government approved another round of licensed hunting, this time justified on the grounds that it might reduce inbreeding, rather than to increase social acceptance. However, ENGOs appealed this decision, and it was ultimately found in breach of the HD for not being selective nor limited enough. Nevertheless, a research team of Skandulv was commissioned to write a report claiming that the wolf had FCS, which was issued in June 2013, a month after the above-mentioned ruling. Upon delegation from the Parliament, SEPA chose, based on Skandulv's report, the above-mentioned number of 270 individuals to establish the FCS of wolves.

Therefore, because the wolf wasn't anymore at an unfavourable conservation status, the government probably thought that licensed hunting policies wouldn't be held against such a strict analysis by national courts or by the Commission. However, the

³³⁹ Ibid., p. 356.

³⁴⁰ Ibid., p. 348.

³⁴¹ Darpö 2011, p. 19.

³⁴² Ibid., p. 12.

decision of granting FCS to wolves despite the conflicting scientific evidence, led to an increase in the discussions with the EU Commission, which led, on January 25th, to Janez Potočnik issuing a letter stating his disapproval to the Swedish minister of environment.³⁴³ Even though licensed hunting was authorized in 2014 and 2015 as well, it shall be noted that only in 2010 and 2015 it took place in its entirety, since the other yearly hunts were, at least, partially stopped by the Courts.³⁴⁴ It was based on this effort from national courts to monitor the legality of hunting decisions that the Commission, in its own words, “did not consider it useful to further pursue the infringement at that point”.³⁴⁵ However, this changed in 2015 when 44 wolves were to be killed according to a new decision on licensed hunting, which drove the Commission, in June 19th, to take action with the issuance of an additional reasoned opinion where it stated the following: licensed hunting wasn’t fulfilling the requirements under article 16.1(e) regarding the lack of alternative solutions, the strict supervised conditions, the limited extent and the selectiveness. Moreover, the Commission considered that Sweden hadn’t provided enough proof on the FCS of wolves and on how wouldn’t its restoration be affected at the local level by the hunt, and that the license hunt of 2010, 2011, 2013, 2014 and 2015 constituted a “systemic practice” in breach of the HD.³⁴⁶

Despite of the Commission’s advice, a licensed hunt for 2016 was decided on November 11th 2015, concerning 46 wolves.³⁴⁷ The Commission, when asked for the length of the infringement proceeding and the reasons why it hadn’t brought the case to the CJEU yet, answered that “the purpose of the infringement procedure is to give the Member States the opportunity to remedy the alleged breach of EU law and/or to explain its position to the Commission”.³⁴⁸ Moreover, the Commission reminded of its discretionary power to bring the case before the CJEU.³⁴⁹ In 2017, with the HFD’s ruling as a precedent, a licensed hunt of 24 wolves was executed.³⁵⁰ The case *is* “still under investigation” and, according to the Commission in its declarations on 29th June 2018, “followed up closely” with regular meetings being held between the Commission and

³⁴³ Darpö and Epstein 2014, p. 357-358.

³⁴⁴ EP, Committee on Petitions 2019, p. 2. However, in 2013, for example, 3 wolves were killed before the injunction was granted: Darpö and Epstein 2014, p. 358.

³⁴⁵ EP, Committee on Petitions 2019, p. 2.

³⁴⁶ Darpö and Epstein 2015, p. 19.

³⁴⁷ EP, Committee on Petitions 2019, p. 2.

³⁴⁸ *Ibid.*

³⁴⁹ *Ibid.*

³⁵⁰ Stenseke 2021, p. 289.

Swedish authorities.³⁵¹ Since SEPA’s decision on 7 June 2018, cancelling the 2019 licensed hunt due to the wolf population’s decrease, the Commission has only made available to the public the Reply IV to Petition No 0011/2015 in March 2019. Here, the Commission said to be “looking forward to the decision of the Swedish authorities for 2020”, while being “in close contact with the Swedish authorities to follow up on the situation”.³⁵²

One might ask, against this backdrop, if the EU Biodiversity Strategy 2030 might hold some potential to speed up the proceeding, which looks rather stalled since the last reply of the Commission in 2019.³⁵³ On one hand, the EU Biodiversity Strategy commitment that, by 2030, no species nor habitat conservation status deteriorates, and that a 30% subset achieve FCS or a strong positive trend, might be beneficial for the Swedish wolf as previously explained in Chapter 2.1. However, the baseline to assess this commitment is set in 2019, which means that, since the Swedish wolf was decreasing in 2019, which was the reason why the licensed hunt was frozen at the time, this baseline might lead to what in ecology has been named the shifting baseline syndrome, which leads to a “continuous lowering of standards of nature and the acceptance of degraded natural ecosystems to be the normal state of nature”.³⁵⁴ Indeed, the number of individuals is increasing again in Sweden, which, apart from entailing that licensed hunting is being issued again, might imply that the Swedish wolf already fulfils the target of showing a strong positive trend. However, one could argue that the wolf is already considered at FCS in Sweden, despite the conflicting scientific evidence in this respect. Be that as it may, the progress and target achievement of such targets are to be assessed not only through the elements available in the HD, i.e. FCS and article 17 national reporting, but also the European Red List of Species, in order to choose the “top priority candidates for targeted restoration/improvement measures”.³⁵⁵ Thus, and since the Swedish Red List classifies the Scandinavian wolf as Highly Endangered, the chances of the wolf being put under the spotlight would be a little bit higher, if it weren’t for the risk of the 2019 baseline

³⁵¹ EP, Committee on Petitions 2019, p. 5.

³⁵² Ibid.

³⁵³ Ibid., p. 5.

³⁵⁴ Vera 2009, p. 98.

³⁵⁵ EC 2021, *Biodiversity Strategy for 2030: Guidance to Member States on how to select and prioritise species/habitats for the 30% conservation improvement target under the strategy*, p. 6.

lowering ambition. However, the 2019 baseline might not lower any ambition, if the decision of the Riksdag to lower the population by half is effectively followed by SEPA.

Another element where it is not clear if the infringement proceeding of the EU Commission would benefit from the Strategy is in its cross-border nature. That is because, on one hand, the EU Commission emphasizes the special importance of transboundary migratory species in relation to the 30% subset target, but at the same time, the Strategy recognizes the problems raised by populations shared by non-EU border countries, such as is the case of Sweden with Norway. According to the Guidance, these cases might be better addressed through their appropriate forums, which in here would be the common forum between Sweden and Norway of the Bern Convention, to which they're both signatories. However, as has been previously highlighted, the efficiency of the Bern Convention's institutions are quite dubious in comparison with those of the EU Commission.³⁵⁶ Thus, while the transboundary character of the Scandinavian wolf might be beneficial for its prioritization, since it is highlighted as an important element to be considered for the 30% target, it might also entail a lowering of standards for Sweden since the conservation of this population might be delegated to the Bern Convention forum, decreasing the chances of this infringement proceeding gaining more priority as long as this conflict could be better addressed in conjunction with Norway under the Bern Convention.

Of most importance is Pillar III "Enabling transformative change", which can influence the stalling of the EU Commission's infringement proceeding against Sweden, since one of its key commitments is to improve the implementation and enforcement of the HD. In this sense, it is quite obvious that little has changed in Sweden's wolf policy since the last Commission's additional reasoned opinion on the topic, and most of its reasonings behind the alleged breach of article 16.1(e) still apply for today's situation. Indeed, since the key commitment on implementation improvement stemming from Pillar III has among its special focus of attention that of weak enforcement, it would show a great deal of efficiency on the part of the Strategy if it addressed the everlasting issue of the EU Commission infringement proceeding against Sweden. Moreover, the connection between Swedish licensed hunting policies and the curse of poaching could fit into

³⁵⁶ Trouwborst et al. 2017, (n 47) 164.

another of the elements that Pillar III will be devoted to, that is, the reinforcement of species protection provisions in order to combat illegal activities.³⁵⁷

In 2023 the Commission will assess if the cooperation-based approach of the Strategy is functioning well enough, and whether it is necessary to shift towards a legally binding approach. However, even the legally binding restoration targets that were already supposed to be enacted in 2021 are still delayed, so the chances that in 2023 a more comprehensive legally binding approach will be adopted, are not very high. However, in the event that a legally binding approach was adopted, this might wake up the infringement proceeding in question, since the EU Commission would have more grounds to pursue the effective compliance not only of the legally binding obligations under Habitats Directive, but also of the EU Biodiversity Strategy. Be that as it may, if the measure proposed by the Riksdag's Committee of keeping wolves at an FRP of 170 individuals is approved, the EU Commission will be confronted with the same scenario that it once contentiously confronted, since Sweden would lower even more the population ceilings that the EU Commission harshly criticized over eleven years ago, in the beginning of the proceeding, in 2011. Indeed, the reputational costs of its further inaction if such a defiance of its "watchdog" role takes place in Sweden, cannot be overestimated. The influence that the EU Biodiversity Strategy 2030 might hold for accelerating this process is, however, dubious.

³⁵⁷ EC 2021, *EU Biodiversity Strategy for 2030*, p. 25.

4 Conclusions

An in-depth analysis has been developed along the whole thesis to not burden the conclusions excessively. Thus, here I will explain more succinctly the connection between what's been elaborated in previous lines and the main objective of the Habitats Directive of conserving the species at FCS. I conclude that Swedish licensed hunting policies aren't in line with EU law for several reasons:

First, the legal operationalization of such policies doesn't lead to the achievement of the Habitats Directive's objective due to a dilution of environmental standards that goes all the way from the Directive's text to the specified CABs in charge of its deployment. The object of the Habitats Directive and of the Environmental Code is the environment (a reactor) per se, for which anthropogenic impact must be controlled and, thus, human activities shall be subject to its scope (activity-related).³⁵⁸ This, however, doesn't mean that the environmental goal of wolf conservation shall be disunited in compartmentalized activity-related laws whose main goal is not that of biodiversity conservation, but rather the main regulation of a human activity, in this case hunting. This led, in the first drafts of the Swedish Environmental Code, to a de facto emptying of its competences, according to Steffan Westerlund, although this was fortunately corrected.³⁵⁹

Indeed, the example of article 16.1(e) HD's transposition in Swedish law is paradigmatic in this respect: it is not to be found in the main environmental legal acts, but rather it is delegated to the Hunting Regulation. As Westerlund warned, “[n]o sector agency focusing on only forestry, agriculture, or whatever to the left [i.e. human activities] can encompass the holistic problems to the right [i.e. Nature]”³⁶⁰. However, this is what has happened in practice in some countries of the EU: that, despite being environmental protection recognized in laws hierarchically superior to those regulating, in this case, hunting, the material content of environmental protection is being handled

³⁵⁸ Steffan Westerlund made a distinction between actors and reactors, focusing on human's physical conduct. Thus, on one hand we have societal systems (actor) and on the other nature (reactor). Nature is a reactor as it reacts to anthropogenic impact, which triggers non-linear consequences whose scope is not easy to foresee. Westerlund 2007, p. 21 and 422–423.

³⁵⁹ Ibid. 559 (40.09).

³⁶⁰ Ibid. 561 (40.12).

by sectoral activity-related laws which are hierarchically inferior and have their own agenda, based on a flawed application of the ideal of environmental integration.³⁶¹

The implications of this legal fragmentation are even more obvious when CABs' argumentation on the necessity of licensed hunting are analyzed, since hunting laws are previous to the creation of environmental law and, thus, are entangled in a rhizome³⁶² of legal principles and conflicting interests that were designed and validated before the ecological dilemma started to be discussed in the public fora. This means that hunting law is more centered in *general ideas of legal equity* between different human interests than in the underlying precondition of ecological sustainability. In other words, it doesn't recognize *finitude*.³⁶³

This lack of recognition on finitude means that *environmental planning* regarding wolf hunting is not really developed within a *development space*, that is, the space of development within what is ecologically sustainable.³⁶⁴ However, Courts are forced nevertheless to assess these policies against the backdrop of the Habitats Directive, and this creates inconsistencies that ultimately lead to apparently arbitrary decisions.³⁶⁵ For example, no one would rationally believe that, if the goal of licensed hunting, under the prism of environmental law's ultimate goal of biodiversity conservation, is to conserve wolves, these can be killed only so that unleashed hunting dogs don't run the risk of being attacked. In the words of Jan Darpö, "[i]f the taking of endangered species is allowed for such a reason, one can only conclude that no wolf will be safe in Sweden".³⁶⁶

Secondly, the lack of sufficient scientific evidence behind the assumption that licensed hunting will reduce poaching is alarming. Up to this day, the amount of scientific evidence pointing to the contrary, i.e., that allowing the hunt of a protected species

³⁶¹ The degradation of the Environmental Code's provisions through sectoral regulations is not unique of Sweden, in this sense. Another example is the Spanish Constitution, where the right to enjoy an appropriate environment and the duty to protect it, is established in article 45, while hunting is only mentioned in relation to its delegated regulation by Autonomous Regions (art. 148.1.11). In practice, however, hunting regulations have been regulating the management of protected species such as the wolf for decades.

³⁶² A rhizome as opposed to hierarchical structures: "rhizome theory opens up for an open-ended pluri-disciplinary approach to law, without predetermined boundaries and hierarchies" Stenseke 2021, p. 61–63.

³⁶³ Westerlund 2007, p. 518 (37.19).

³⁶⁴ Ibid., p. 467 (34.34).

³⁶⁵ E.g., the assumption of licensed hunting leading to poaching prevention or decreased socioeconomic consequences without a proper justification. Stenseke 2021, p. 288.

³⁶⁶ Darpö 2011, p. 12.

increases the tolerance towards its hunting, rather than its life's value, is astonishing.³⁶⁷ However, there is another reason to discard this reasoning, and it is the cynicism of such assumption: licensed (or management)³⁶⁸ hunting is supposedly regulated because, if they prohibit to hunt an endangered species beyond what is strictly deemed necessary for livestock protection or the other specified purposes in article 16 HD, people will do it illegally. We can replace the term “licensed hunting” and “to hunt an endangered species” for an indefinite number of other activities that few people would agree with: “[drugs] are regulated because, if they prohibit to [consume and sell drugs], people will do it illegally”, and a long etcetera. With this I am not arguing that those who defend the legalization of drugs are being irrational, I'm just highlighting that, if this logic is to be followed, then, it might as well be applied to other areas of governance which don't enjoy so much consensus among the public.

Lastly, some elements shall be said on the capacity of environmental law to be *organic*, that is, the law that is “constructed and applied with full understanding of the realities concerning the object, its context and the purposes of the law in question”.³⁶⁹ Here, I find inconsistencies both in Sweden and in the EU Commission's practice. In this sense, the concept of FCS has to be adapted to the ecological reality of the wolf, which means that it must adapt to the migratory nature of this species and, thus, be assessed at a transboundary level. In this, I agree with the Swedish approach. However, an adaption of the law to the ecological reality shall also assess the anthropogenic impact already inflicted on the actual reality of the species at the moment. In this sense, connectivity with Finland is virtually theoretical, so that the law can't start applying a concept based on the migratory nature of a species if this species is de facto being prevented from displaying its full ecological potential in the first place in terms of migratory capacity. Therefore, even though, in theory, I might disagree with the EU Commission's standpoint of focusing only on national assessments of FCS when bringing cases to the CJEU, I agree in practice with its approach as long as the material reality of the wolves is not really transboundary due to anthropogenic impacts. In this sense, law can be *organic* as it adapts to the material reality of the species under anthropogenic conditions.

³⁶⁷ Chapron and Treves 2016.

³⁶⁸ Darpö 2011, p. 10.

³⁶⁹ Westerlund 2007, p. 640.

I find that environmental rationality is clearly lacking in the wolf legal discourse, mostly, in the emphasis given to population trends in detriment of pure results when setting the perspective. This has to do with nature's non-linearity and ecosystem resilience. Along this thesis, it's been made patent that conclusions on wolves' conservation status have sometimes been drawn on the basis of increasing population trends. However, nature is non-linear, which means that, once something is caused in nature, this may trigger a multiplicity of consequences that aren't necessarily linear and are, therefore, highly unpredictable to the human eye.

Thus, when we presume that populations may recover from anthropogenic impact because they've been doing so in the past, or simply because they are not clearly decreasing, we can sometimes assume that populations' ecological resilience is shielded from our human impact based on flawed premises. Indeed, if certain thresholds are crossed due to the cumulative impact of several factors (reduced space, reduced genetic diversity to adapt to environmental changes, and a long etcetera)³⁷⁰, these can unleash a Domino effect (though non-linear) that is pretty much out of human control. Therefore, increasing trends not only shouldn't be confused with results, but they shouldn't be confused with ecosystem resilience. In this sense, "ecosystem resilience can hide ecological problems following from anthropogenic impact"³⁷¹ and, thus, precaution is more necessary than ever.

In the words of Staffan Westerlund,

[i]f a theory in legal science [...] presumes or presupposes something that natural science does not sustain, then this theory is inherently wrong", and "[i]f a strategy or control system is constructed based on theory that is wrong according to the previous thesis, then the strategy or control system will not be goal-effective.

If there is something that has been made clear along this thesis, is the amount of non-scientific assumptions embedded in the wolf conflict and, most importantly, in its legal framework.

³⁷⁰ Westerlund ELM, p. 44 (4.15).

³⁷¹ Ibid., p. 475 (35.15).

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