

Provisional text

OPINION OF ADVOCATE GENERAL
SAUGMANDSGAARD ØE
delivered on 8 May 2019 (1)

Case C-674/17

Luonnonsuojeluyhdistys Tapiola Pohjois-Savo — Kainuu ry
other persons involved and parties:
Risto Mustonen,
Kai Ruhanen,
Suomen riistakeskus

(Request for a preliminary ruling from the Korkein hallinto-oikeus (Supreme Administrative Court, Finland))

(Reference for a preliminary ruling — Directive 92/43/EEC (‘the Habitats Directive’) — Conservation of natural habitats and of wild fauna and flora — Article 12(1)(a) — Prohibition on the deliberate killing of the species referred to in Annex IV (a) — Species *Canis lupus* (wolf) — Article 16(1)(e) — Derogation — Conditions — Practice of ‘hunting for population management purposes’)

I. Introduction

1. By its request for a preliminary ruling, the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) seeks guidance from the Court of Justice on interpretation of Article 16(1)(e) of Directive 92/43/EEC, (2) commonly known as ‘the Habitats Directive’.

2. This request is made in proceedings between the Luonnonsuojeluyhdistys Tapiola — Pohjois-Savo Kainuu ry (Tapiola Pohjois-Savo Kainuu Association for Nature Conservation, ‘Tapiola’) and the Suomen riistakeskus (Finnish Wildlife Agency, ‘the Agency’). Tapiola has applied to the referring court for annulment of two decisions by which the Agency, for the 2015-2016 hunting year, authorised the killing of wolves as part of the practice of hunting ‘for population management purposes’.

3. The fundamental purpose of that practice was to make the inhabitants of areas adjacent to those occupied by wolves more tolerant of their presence, with the aim of reducing poaching and thereby improving the conservation status of the wolf population. The referring court wishes to know whether and, if applicable, under what conditions, Member States can authorise hunting for

population management purposes on the basis of Article 16(1)(e) of the Habitats Directive. Under that article, Member States can derogate from their obligation to ensure that they prohibit the deliberate killing of wolves as specimens of a strictly protected species under that directive, provided they meet a number of conditions.

II. Legal context

A. EU law

4. According to Article 1(g) of the Habitats Directive, ‘species of Community interest’ are those that, within the territory referred to in Article 2 of that directive, are ‘endangered’, ‘vulnerable’, ‘rare’, or ‘endemic and requiring particular attention by reason of the specific nature of their habitat and/or the potential impact of their exploitation on their habitat and/or the potential impact of their exploitation on their conservation status.’ Those species ‘are listed or may be listed in Annex II and/or Annex IV or V’.

5. Article 1(i) of that directive defines the ‘conservation status of a species’ as ‘the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2’ and lists the criteria on the basis of which a species’ conservation status can be taken as ‘favourable’.

6. Article 2 of that directive provides as follows:

‘1. The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna and flora in the European territory of the Member States to which the Treaty applies.

2. Measures taken pursuant to this Directive shall be designed to maintain or restore, at favourable conservation status, natural habitats and species of wild fauna and flora of Community interest.

3. Measures taken pursuant to this Directive shall take account of economic, social and cultural requirements and regional and local characteristics.’

7. Article 12(1) of the Habitats Directive provides:

‘Member States shall take the requisite measures to establish a system of strict protection for the animal species listed in Annex IV (a) in their natural range, prohibiting:

a) all forms of deliberate capture or killing of specimens of these species in the wild;

...’

8. Annex IV (a) to that directive includes, as one of the animal species of Community interest that require strict protection, the species *Canis lupus*, commonly known as the wolf, except, inter alia, the ‘Finnish populations within the reindeer management area’.

9. Article 16(1) of that directive states that:

‘Provided that there is no satisfactory alternative and the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, Member States may derogate from the provisions of Articles 12, 13, 14 and 15 (a) and (b):

(a) in the interest of protecting wild fauna and flora and conserving natural habitats;

- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;
- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;
- (d) for the purpose of research and education, of repopulating and re-introducing these species and for the breedings operations necessary for these purposes, including the artificial propagation of plants;
- (e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.’

B. Finnish law

1. The laws on hunting

10. Under Paragraph 37(3) of Law No 615/93 on hunting, as amended by Law No 159/2011 (‘the Law on hunting’), wolves are subject to an ongoing protection regime. However, under Paragraph 41(1) of that law, the Agency can authorise derogations from that protection subject to compliance with the requirements set out in Paragraphs 41a to c of that law.

11. Paragraph 41(4) of the Law on hunting provides that the rules on the procedure for granting derogations and on their conditions and detailed specifications can be laid down by government regulation. Under Paragraph 41(5) of that law, the maximum number of animals that may be captured or killed annually under derogations can be set by regulation of the Maa- ja metsätalousministeriö (Ministry of Agriculture and Forestry).

12. Paragraph 41a(1) of the Law on hunting transposes Article 16(1)(a) to (d) of the Habitats Directive into Finnish law. Paragraph 41a(3) of that law transposes Article 16(1)(e) of that directive, stating that ‘a derogation permit in relation to wolves ... may likewise be granted to capture or kill certain specimens, selectively and to a limited extent and under strictly supervised conditions’.

2. Government Regulation No 452/2013

13. Under Paragraph 3 of Government Regulation No 452/2013, a derogation permit under Paragraph 41a(3) of the Law on hunting may be granted to capture or kill wolves between 1 October and 31 March in the reindeer herding area and between 1 November and 31 March in the rest of the country.

14. Paragraph 4(1) of that regulation provides that a derogation permit can only be granted for a restricted area in which the conditions listed in Paragraph 41a of the Law on hunting obtain. Paragraph 4(3) of that regulation states that derogation permits under Paragraph 41a(3) of the Law on hunting can only be issued for hunting in the areas in which the species in question is present in large numbers.

3. Ministry of Agriculture and Forestry regulations

15. For the 2015-2016 hunting year, Paragraph 1 of Ministry of Agriculture and Forestry Regulation No 1488/2015 on wolf hunting authorised by derogation outside the reindeer herding area (‘Regulation No 1488/2015’), adopted under Article 41(5) of the Law on hunting, set the maximum number of specimens whose capture or killing could be authorised under Article 41a(3) of that law at 46.

16. For each of the hunting years in the period 2016 to 2018, Paragraph 1 of Ministry of Agriculture and Forestry Regulation No 1335/2016 on wolf hunting authorised by derogation outside the reindeer herding area ('Regulation No 1335/2016') placed a limit of 53 on the total number of specimens that could be taken on the basis of the derogation permits under Paragraph 41(1) of the Law on hunting. According to Paragraph 3(3) of that regulation, that number also included wolves destroyed under a police order, killed in traffic or otherwise known to have died.

4. *The wolf population management plan*

17. On 22 January 2015, the Ministry of Agriculture and Forestry adopted a new management plan for the wolf population in Finland ('the population management plan'). (3) That plan was intended to restore and maintain that population at a favourable conservation status. In that plan, the minimum size of a viable wolf population was put at 25 breeding pairs. The plan provided for local management of the wolf population aimed at ensuring the viability of each pack whilst favouring the co-existence of people and wolves.

18. The population management plan noted that no derogation for hunting for population management purposes ('derogation permit') had been granted for the killing of wolves since 2007. After 2007, the wolf population in Finland had in fact declined, reaching its lowest level in 2013 with an estimated approximately 120 specimens. Over that period, efforts were made to increase that population by means of a policy of strict protection. Only damage-prevention derogations were envisaged. Even though the wolf population was falling, criticism in rural areas about the presence of wolves and the resulting problems continued and even increased. The reason for the evident failure of that policy appears to be that the competent authorities were unable to respond to the concerns of people living close to wolves. Frustration strengthened the feeling in society that it was acceptable to kill wolves unlawfully.

19. In the light of the foregoing, the population management plan was based on the premiss that the wolf population conservation policy could only succeed if the needs and concerns of those people were taken into account. In order to respond to those needs and concerns and to establish a lawful model for managing the wolf population in which it was possible to take action against individual animals that were causing nuisance and, in that way, prevent poaching, the management plan provided that derogation permits could be issued. The number of derogation permits would not be more than the maximum number of individuals that could be killed annually in Finnish territory by way of hunting for population management purposes set by regulation of the Ministry of Agriculture and Forestry on the basis of information supplied by the Luonnonvarakeskus (Finnish Institute of Natural Resources).

20. Derogation permits could only be granted to capture or kill certain individual wolves, selectively and to a limited extent, in areas in which the species was present in large numbers, and under strictly supervised conditions. It was for the Agency to assess on a case-by-case basis whether the pack in question was viable. In certain cases, a derogation permit could also be issued covering the areas occupied by individual wolves that were causing damage or nuisance, provided the species was present in large numbers in the area in question.

21. In particular, it was considered necessary to select the individuals to be killed in order to ensure the viability of the pack. The management plan therefore established that the individual to be hunted should be a young individual in the pack or, where applicable, the individual causing damage or nuisance to the inhabitants of the areas concerned or their property. The agency had to assess on a case-by-case basis whether there were any satisfactory alternatives to issuing a derogation permit.

III. The main proceedings, the questions referred and the procedure before the Court of Justice

22. By decisions of 18 December 2015 ('the contested decisions'), the Agency issued Risto Mustonen and Kai Ruhanen with hunting permits under Paragraph 41 and Paragraph 41a(3) of the Law on hunting, authorising them to kill wolves between 23 January and 21 February 2016 in the region of Pohjois-Savo (Finland).

23. The decisions addressed to Mr Mustonen and Mr Ruhanen authorised them to kill four and three wolves respectively. In respect of each killing, the permit was limited to the territory of a particular pack identified in the relevant decision. Each of the packs in question comprised between five and seven individuals and was considered to be viable and stable. A number of other packs were established within a radius of the areas covered by the hunting permits.

24. In those decisions, the Agency stated that a number of individuals belonging to the packs living in those areas had repeatedly caused damage or nuisance. Wolves had in particular injured dogs during hunting. Although keeping dogs in cages had limited that harm, that solution was not seen as suitable in a hunting context. The areas in question, although isolated, had families with children living in them. The parents were concerned for their children's safety.

25. The contested decisions contained recommendations. First, they advocated avoiding killing an alpha and that the hunting should focus on young animals or individuals causing nuisance. Secondly, the decisions recommended avoiding killing tagged individuals. Thirdly, the contested decisions urged the permit holders to take into account any mortality affecting individuals in the packs to which the derogation related and confirmed by the authorities before the start of the authorised hunting period. They also recommended reducing the number of wolves killed so that the total number killed did not exceed the number of individuals initially envisaged in the hunting permits.

26. Those decisions also referred to the applicable national legal framework and to the management plan. The Agency indicated in those decisions that, in its view, the number of wolves that could be killed under the derogation permits issued within the maximum quota of 46 individuals set in Paragraph 1 of Regulation No 1488/2015 did not jeopardise the maintenance or restoration of the species at a favourable conservation status in its natural range. The Agency also asserted that there was no satisfactory alternative to granting derogation permits in the areas in question. The hunting would take place under strictly supervised conditions. That it was selective and limited was, the Agency asserted, ensured in practice by means of geographical and quantitative restrictions established in the contested decisions and the need to comply with the hunting method they prescribed.

27. On 31 December 2015, Tapiola brought actions before the Itä-Suomen hallinto-oikeus (Administrative Court, Eastern Finland, Finland) seeking annulment of the contested decisions and a prohibition on their implementation. By judgments of 11 February 2016, that court held that those actions were inadmissible. Tapiola appealed against those judgments. By orders of 29 May 2017, the Korkein hallinto-oikeus (Supreme Administrative Court) partially gave leave for that appeal.

28. In support of its action, Tapiola claims that the contested decisions infringe, inter alia, Articles 12 and 16 of the Habitats Directive. It argues that Article 16(1)(e) of that directive refers solely to situations in which the good conservation status of the population of the species concerned requires or allows a derogation from the obligations to ensure strict protection of that species. However, according to Tapiola, hunting is liable to have an adverse effect on the conservation status of that species, which is already seriously endangered in Finland. Nor, furthermore, has it been shown that wolf hunting is capable of achieving the objectives that the management plan attributes to it. Tapiola adds that the Agency issued each derogation permit on the basis of an assessment relating only to the territory to which the permit related, without taking into account the cumulative effect on wolves' conservation status of all the permits for the various territories.

29. In its defence, the Agency notes that hunting for population management purposes arose

from a trial, associated with implementation of the management plan, that was limited to 2 years. That trial was not extended, as borne out by adoption of Regulation No 1335/2016. The Agency claims that it checked in detail that the requirements under Article 16(1)(e) of the Habitats Directive were satisfied. It adds that the level at which the impact of a derogation permit should be assessed depends on the biology of the species. For wolves, that level is not the pack but all populations taken together, including those that move beyond national borders.

30. In that context, the referring court observes that the species *Canis lupus* is seriously endangered in Finland. The number of wolves in the country has fluctuated considerably over the years and it has been assumed that those variations are linked to poaching. The small size of the wolf population furthermore makes it vulnerable to the influence of chance.

31. That court wishes to know, first of all, whether the fact that a derogation permit is issued in the context of a national management plan and of national rules that set an annual maximum number of animals that can be captured or killed for the whole territory of the Member State concerned affects whether or not that derogation complies with Article 16(1)(e) of the Habitats Directive. The court also enquires whether under that article hunting for population management purposes can target a local population whose conservation status is favourable, without any assessment of the conservation status of the wolf population at the level of the national territory. The same court also wishes to know whether a derogation permit can be granted, even where the conservation status of that population is not favourable, provided that the derogation permit does not further worsen that status.

32. Secondly, the referring court is uncertain whether the contested decisions comply with the requirement that there be no satisfactory alternative, set out in the introductory part of Article 16(1) of the Habitats Directive. That court notes in that regard that it is not scientifically proven that hunting for population management purposes reduces poaching to such an extent that it has an overall favourable impact on the conservation status of wolves. The referring court adds that the derogation permits at issue in the main proceedings were also intended to prevent harm to dogs and improve the general feeling of security of the people living in the areas in question. However, nothing expressly indicates that those derogation permits fall within the situations to which Article 16(1)(b) and (c) of the Habitats Directive refers.

33. In the light of the foregoing, by an order of 28 November 2017, received at the Court of Justice on 1 December 2017, the Korkein hallinto-oikeus (Supreme Administrative Court) stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

- ‘1) Can regionally restricted derogation permits based on applications from individual hunters be granted for hunting for “population management purposes” under Article 16(1)(e) of the Habitats Directive, ... having regard to the wording of that provision?
 - (a) In considering that question, is it relevant that the discretion exercised when deciding on derogation permits is governed by a national population management plan and by the maximum number of individual animals killed laid down in a regulation, under which derogation permits may be granted annually for the territory of the Member State?
 - (b) As part of that consideration, may account be taken of other factors, such as the objective of preventing harm to dogs and increasing the general feeling of security?
- 2) Can derogation permits be granted for hunting for population management purposes, as described in the first question, on the basis that there is no satisfactory alternative within the meaning of Article 16(1) of the Habitats Directive to prevent poaching?
 - (a) In such circumstances, may account be taken of the practical difficulties associated with the monitoring of illegal poaching?

- (b) In considering whether a satisfactory alternative exists, is the objective of preventing harm to dogs and increasing the general feeling of security also potentially a relevant factor?
- 3) How is the requirement laid down in Article 16(1) of the Habitats Directive concerning the conservation status of species' populations to be assessed when regionally restricted derogation permits are granted?
- (a) Is the conservation status of a species to be assessed by reference both to a particular area and to the territory of the Member State as a whole or by reference to an even wider range of the species in question?
 - (b) Is it possible to satisfy the requirements for granting a derogation permit laid down in Article 16(1) of the Habitats Directive even though the conservation status of a species cannot be regarded as favourable within the meaning of the directive on the basis of a proper assessment?
 - (c) If the previous question is answered in the affirmative, in which circumstances could that be possible?
34. Tapiola, the Agency, the Finnish and Danish Governments and the European Commission lodged written observations with the Court of Justice. Those parties, as well as Mr Ruhanen and the Swedish Government, presented oral argument at the hearing on 9 January 2019.

IV. Analysis

A. Preliminary observations

35. The contested decisions allowed the killing of a total of seven wolves under the provision of Finnish law transposing Article 16(1)(e) of the Habitats Directive. They therefore formed part of exercise of the Agency's power, under the management plan, to authorise hunting for population management purposes within the limit of 46 individuals set by the national rules for the 2015-2016 hunting year.

36. In the management plan, the Agency identified as an obstacle to the success of the wolf protection policy the fact that the rural populations established near the areas where wolves lived had not given it their support. The policy's lack of legitimacy in the eyes of those populations appeared to have given rise to widespread poaching. The management plan was a trial designed to assess whether legalising the hunting of a predetermined number of wolves would reduce poaching and, ultimately, improve the conservation status of the wolf population. As can be seen from the order for reference, the referring court also took into account in that context the aims of preventing dogs from being injured by wolves and improving the general feeling of security of rural populations.

37. That court nevertheless noted that, as the Finnish Government confirmed at the hearing, the trial described did not show conclusively that hunting for population management purposes was effective in combating poaching in such a way as to improve the conservation status of the wolf population. The trial was furthermore discontinued, and derogations from the prohibition on deliberately killing wolves were subsequently granted only for the reasons set out in the provisions of Finnish law transposing Article 16(1)(b) and (c) of the Habitats Directive.

38. By the questions it has referred, that court is asking, in essence, whether, to the extent that they derogate from the obligation to ensure that the deliberate killing of wolves is prohibited, established in Article 12(1)(a), read together with Annex IV (a) of the Habitats Directive, the contested decisions satisfied the requirements set out in Article 16(1)(e) of that directive and,

accordingly, complied with those provisions. (4)

39. According to Article 16(1) of the Habitats Directive, any derogation from that obligation must comply with two general requirements. First, the absence of a satisfactory alternative is a precondition for granting the derogation (section B). Secondly, the derogation must not be detrimental to maintenance of the populations of the species concerned at a favourable conservation status in their natural range (section C).

40. Furthermore, that provision may only be used on the basis of one of the grounds of derogation established in Article 16(1)(a) to (e). Article 16(1)(e) of the Habitats Directive, the relevant article in the present case, allows derogations to be granted in order, in particular, to allow the killing of specimens of the species listed in Annex IV (a) of that directive, (5) subject to complying with a number of specific requirements (section D).

41. Ascertaining whether all those conditions involve factual assessments that are within the exclusive competence of the referring court. The Court of Justice's answers to the questions referred will nevertheless assist it in that task.

42. Before beginning to analyse those questions, I believe it is helpful to summarise a number of general pointers, already provided by the Court's case-law, which will guide me as I make that analysis.

43. First of all, the Court of Justice has repeatedly held that because Article 16(1) of the Habitats Directive establishes a regime that derogates from the strict protection obligations under Annex IV (a) of that directive, it must be interpreted strictly. (6)

44. Then, since that article provides for exceptional arrangements, the burden of proving that the conditions it sets out are present for each derogation falls on the Member State authority taking the decision. In addition, a derogation can only be granted on the basis of a decision containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in that article. (7)

45. Lastly, the case-law on Article 9 of the Birds Directive, (8) under which Member States are authorised to derogate from the obligations to protect wild bird species under conditions comparable to those established in Article 16(1) of the Habitats Directive, is also relevant to interpreting that article. (9) The Court of Justice has held in particular that any derogation granted under Article 9 of the Birds Directive must be based on scientific — geographic, climatic, environmental and biological — factors. (10) As with other findings that emerge from the case-law on Article 9 to which I will refer below, (11) I believe that principle can be transposed to Article 16(1) of the Habitats Directive.

B. Scope of the requirement that there be no satisfactory alternative

46. In the introductory part and point (b) of its first question and in its second question, the referring court enquires, in essence, whether the objective of combating poaching, where applicable in conjunction with the objectives of preventing wolves from injuring dogs and reassuring local populations, can justify granting a derogation permit under Article 16(1)(e) of the Habitats Directive. It seeks to determine, in particular, whether, having regard for the practical difficulties encountered in monitoring poaching, granting a derogation permit complies with the requirement, set out in the introductory part of Article 16(1) of that directive, that a derogation can only be authorised provided 'that there is no satisfactory alternative'.

47. To my mind, that requirement can be seen as a specific manifestation of the general principle of proportionality that prevails in EU law. (12) It effectively requires a Member State that intends to grant a derogation clearly to identify the legitimate objective it is pursuing (section B.1). Once that objective has been shown, the Member State in question must establish that the derogation is

capable of (section B.2) and necessary to (section B.3) achieving it. (13)

1. Identifying the objectives pursued by the derogation permits

48. As the order for reference states, the derogations at issue in the main proceedings, and the management plan of which they formed part, simultaneously pursue the objectives of reducing poaching, preventing harm to dogs and improving the general feeling of security of people living near the areas occupied by wolves. The last two objectives were presented as being closely linked to the first objective, to the extent that achieving them would, according to the Agency, help increase ‘social tolerance’ of wolves among the local human populations and, as a result, reduce illegal hunting. The purpose of derogation permits lay, therefore, at the confluence of the objective of conserving wolf populations and the opposing human interests.

49. As emerges from an interpretation of the wording, scheme and purpose of Article 16(1)(e) of the Habitats Directive, the objectives described above are, in my view, legitimate aims that can be relied upon to support a derogation based on that article.

50. First of all, I note that, unlike the other grounds of derogation listed in Article 16(1) of that directive, Article 16(1)(e) does not list the objectives that can be pursued by granting a derogation. That point does, however, lay down additional requirements relating in essence to the limited number of specimens to be taken, the selective basis of hunting and the strictly supervised conditions to which the derogation is subject. Those specific requirements offset the Member States’ wide discretion to define the aims pursued by means of the derogation.

51. Under those circumstances, the objectives that can justify granting a derogation permit under Article 16(1)(e) of the Habitats Directive can include both improving the conservation status of the species and protecting opposing interests. Those interests include, but are not limited to, those referred to in Article 16(1)(a) to (d). Given the particularly strict requirements set out in Article 16(1)(e), granting a derogation permit on that basis in order to pursue objectives that overlap with those listed in Article 16(1)(a) to (d) does not, contrary to the assertions of Tapiola and the Commission, have the effect of circumventing the grounds for derogation established in that article.

52. In practice, as the Finnish and Danish Governments observed, since the detailed specifications under Article 16(1)(e) of the Habitats Directive are stricter than those accompanying the other grounds for derogation, use of that provision to pursue objectives already covered by Article 16(1)(a) to (d) of that directive will be envisaged where it has not been shown that the requirements for those grounds of derogation to apply have been satisfied. (14)

53. Secondly, the interpretation I am proposing is in line with the purpose of Article 16(1)(e) read in conjunction with Article 2 of the Habitats Directive. That purpose is to give the Member States leeway in order to take account of economic, social and cultural requirements and regional and local characteristics, (15) whilst ensuring that this does not jeopardise achievement of the overall objective of the regime providing for strict protection of animal species of Community interest — that is to say, maintaining or restoring those species at a favourable conservation status. (16)

54. Nevertheless, as the Commission noted, the derogation decision must define the objectives relied upon in support of a derogation clearly, precisely and with supporting evidence. (17) Indeed, only such a decision makes it possible to review whether the derogation is appropriate and necessary, which depends on the aims it pursues. (18) As can be seen when applying by analogy the case-law on Article 9(1) of the Birds Directive, for the purpose of granting a derogation, Article 16(1) of the Habitats Directive ‘must be applied appropriately in order to deal with precise requirements and specific situations’. (19)

55. It will be for the referring court to ascertain whether the derogation permits at issue in the main proceedings were aimed at resolving specific problems defined clearly and precisely in the

decisions on which they were based. The following observations can guide it in that examination.

56. First, no one disputes that, as the Agency found in the contested decisions, at the time those decisions were made poaching represented a considerable challenge to the success of the wolf conservation policy, a finding that the referring court judged credible. The Agency also observed that dogs had been injured by wolves. Even assuming that it were found to be correct, Tapiola's allegation that the Agency has not established that there is a statistically high risk of harm to dogs does not cast doubt on the fact that the problem identified by the Agency exists, albeit possibly to a limited extent.

57. Secondly, as the Commission argues, the objective of improving the general feeling of security of the inhabitants of the areas covered by the derogations was, in contrast, probably worded in terms too general for it to be possible to examine whether those derogations were proportionate to pursuit of that objective. Specifically, it is not apparent from the order for reference whether the Agency provided supporting evidence of the existence and extent of those inhabitants' fears or, furthermore, of the threats to their safety. (20)

2. Whether the derogation permits were capable of attaining the objectives pursued

58. In the context of the present case, particular difficulties arise when determining the level of proof needed to establish that the derogation is capable of achieving the previously identified objectives.

59. First, since the derogation permits at issue in the main proceedings arose from a trial intended to ascertain whether limited authorisation of legal hunting could help reduce poaching and, ultimately, improve the conservation status of the wolf population, at the time they were granted by the Agency it was very uncertain whether they could achieve those objectives.

60. That being so, contrary to Tapiola's assertions, there cannot be a requirement to prove, beyond any scientific doubt, that those derogation permits caused a fall in illegal hunting, as soon as they were granted, and that this effect was so great that total mortality attributable to humans declined.

61. As I have already stated, (21) Article 16(1)(e) of the Habitats Directive in my view provides a legal basis for granting derogation permits intended to approve the conservation status of populations of the species concerned where there is a degree of uncertainty whether they will be effective in achieving that aim. As the Finnish Government asserted, derogation permits such as those at issue in the main proceedings can be seen as pursuing the objective of combating poaching by making it possible to assess the effect that permitting hunting for population management purposes has on the level of illegal hunting. Seen from that angle, the fact that the trial was inconclusive does not in itself mean that such derogations are incapable of achieving the objective so described.

62. In my view, in order to establish that the derogation permits are capable of achieving that objective, according to the principles summarised in points 44 and 45 of this Opinion, the competent national authority only needs to support, on the basis of rigorous scientific data, the hypothesis that the hunting for population management purposes would reduce illegal hunting to such an extent that it would have a net positive effect on the conservation status of the wolf population. (22) That hypothesis must be tested, inter alia, by comparing the number of derogation permits envisaged and the most recent estimates of the number of wolves killed unlawfully.

63. The precautionary principle invoked by Tapiola does not undermine that view. In the context of the Habitats Directive, that principle means in essence that where, in the light of the best scientific knowledge in the field, there is reasonable doubt that a human activity will not have adverse effects on the conservation of habitats and protected species, that activity cannot be authorised. (23) However, as I will explain below, that requirement is already included in the

condition, likewise set out in the introductory part of Article 16(1) of the Habitats Directive, that it must be demonstrated, before a derogation is granted, that it *will not be detrimental* to the maintenance or restoration of the populations of the species concerned at a favourable conservation status. (24) The precautionary principle does not require the competent national authorities to prove that the derogation permit will *improve* the conservation status of those populations.

64. In the present case, the decision to refer contains nothing to suggest that, before making the contested decisions, the Agency supported the above referred hypothesis on the basis of scientific data. The referring court must therefore determine whether the Agency did perform that task.

65. In that regard, the Agency argues that it is demonstrated that hunting for population management purposes can reduce poaching, at least in the short term. Tapiola and the Commission claim that the available scientific studies tend to indicate the opposite. (25)

66. Furthermore, according to the information available to Tapiola and the Commission, 43 or 44 wolves were killed in Finland under derogation permits in the 2015-2016 hunting year, out of a total population of between 275 and 310 individuals. Assuming that the referring court confirms those data, the thesis that killing nearly 15% of that population — not counting mortality found to have been caused by other reasons attributable to humans — was able to improve its conservation status should cause the court to be at the very least somewhat circumspect.

67. Tapiola adds, in that respect, that the number of wolves covered by the derogation permits was greater than the annual number of unlawful killings, which the management plan estimated at around 30 specimens. (26) It therefore appears that hunting for population management purposes led to the killing of 14 specimens more than would have been killed as a result of poaching, even assuming — which is doubtful — that the hunting for population management purposes ended all illegal hunting. Subject to the referring court verifying that they are accurate, those data tend to show that the derogation permits in question are not capable of achieving their objective of combating poaching in the interests of protecting the species.

68. As regards, secondly, whether derogation permits can prevent dogs from being injured by wolves, that depends, in principle, as the Commission emphasised, on whether those derogation permits related to the individuals causing the injuries identified. However, according to the order for reference and as the Finnish Government confirmed at the hearing, the contested decisions merely recommended that the persons to whom they were addressed should hunt individuals causing nuisance, but did not oblige them to do so.

69. Nevertheless, according to the judgment of 14 June 2007, *Commission v Finland* (27), it cannot be ruled out that killing one individual in a pack certain of whose members are causing damage may — even if the individuals causing the problems are not targeted — prevent or reduce that damage by making the wolves more wary of humans. According to the Court of Justice, the authority that decides on a derogation permit must however provide concrete evidence to support that hypothesis. The referring court has not indicated whether any such evidence was provided in the present case and will have to verify whether it was.

3. Examination of any alternatives

70. As emerges from the case-law, (28) Article 16(1) of the Habitats Directive requires the Member States to provide a clear and sufficient statement of reasons as to the absence of a satisfactory alternative by which the objectives referred to in support of a derogation could be achieved. (29)

71. The Court has also indicated that the similar obligation to state reasons where recourse is had to Article 9(1) of the Birds Directive is not satisfied where the derogation does not contain any reference to the absence of another satisfactory solution or to the relevant technical, legal and scientific reports. (30)

72. In the present case, as Tapiola and the Commission highlighted, the order for reference does not contain any evidence that the Agency provided any reasons whatsoever as to why the sole means of achieving the objectives relied upon in support of the derogation permits was partially to legalise wolf hunting, nor as to why such a high number of derogation permits was necessary for that purpose.

73. In that respect, as the Commission observed, it is not apparent from that order that the Agency carried out any detailed analysis of the practical difficulties in monitoring poaching that may have led it to conclude that a policy of stricter monitoring and penalisation, together with other preventive measures, was not a satisfactory option. (31) Nor has the referring court specified whether the alternative solutions advocated by Tapiola, such as increasing the loans allocated for the supply of electric fences and implementation of more active policies to inform the local populations, (32) were envisaged and rejected, stating reasons for doing so.

74. Whilst not expressly disputing that there was no such prior analysis, the Agency argues that making penalties harsher would not have deterred poaching because those penalties are perceived as unfair. In other respects, according to the Agency, and as Mr Ruhanen and the Finnish Government also noted, as well as recourse to hunting for population management purposes, the management plan provided for supplementary measures necessary to prevent poaching in the longer term. Those measures included information campaigns, consultation of local populations and compensation for damage caused by wolves.

75. Moreover, as regards the objective of preventing dogs from being injured by wolves, as the Commission emphasised, the referring court does not state that the Agency explained why derogation permits targeted at the individuals causing problems, involving their being killed by professionals where necessary, was not able to achieve that objective.

76. If the referring court were to confirm that the Agency granted the derogation permits at issue in the main proceedings without previously providing a clear and sufficient statement of the reasons why no other solution could have achieved the desired aims, it must find as a result that those derogation permits infringed Article 16(1) of the Habitats Directive.

C. The impact of the derogation permits on the conservation status of the species

1. The geographical levels at which the conservation status of the populations of the species concerned must be assessed

77. In order to verify compliance with the condition, set out in the introductory part of Article 16(1) of the Habitats Directive, that the derogation ‘is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range’, the competent national authorities must, first of all, examine the existing conservation status of those populations. It is only on completion of that examination that those authorities will be in a position to ascertain how the derogation is likely to affect the conservation status of those populations. (33)

78. The first part of the third question, point (a), concerns the geographical levels at which, in that context, the conservation status of a wolf population must be assessed. The referring court asks whether that status must be assessed not only at the level of the local area to which the derogation permit relates, but also at the scale of the territory of the Member State as a whole, or even on a cross-border level where the natural range of the population in question covers the territory of several countries.

79. In that respect, since the Habitats Directive does not define the concept of ‘population’ or that of ‘natural range’, the meaning of those terms in the context of Article 16(1) can be clarified in the light of the purpose of that directive. According to Article 2(1) and (2), read together, that purpose is, in particular, to ensure that species of Community interest are maintained and restored,

at a favourable conservation status, 'in the European territory of the Member States'. The concept of 'favourable conservation status' is, furthermore, defined in Article 1(i) of that Directive by reference to the populations occupying that same territory.

80. Having regard to the foregoing, the concept of 'population', within the meaning of Article 16(1) of the Habitats Directive, cannot be reduced to the local pack to which a derogation permit relates. On that basis, in its judgment of 14 June 2007, *Commission v Finland*, (34) the Court of Justice assessed the conservation status of wolves at the level of the national territory. (35)

81. In the same vein, the Commission guidance document defines 'population' as encompassing a group of individuals of the same species that live in a geographic area at the same time and are (potentially) interbreeding. (36) According to that document, 'natural range', for its part, defines the spatial limits within which the population occurs. (37)

82. With that in mind, as that document and the LCIE guidelines recommend, and as Tapiola, the Finnish and Danish Governments and also the Commission have argued, the conservation status of the populations of the species concerned, and the impact that the envisaged derogation may have on them, must be assessed on the scale of the territory of the Member State or, as the case may be, the biogeographical region in question where the borders of that Member State straddle several biogeographical regions. (38)

83. Moreover, as all the interested parties that have submitted written observations have emphasised and as the Commission guidance document provides, (39) it is generally necessary to assess the impact of a derogation at the level of the territory of a local pack in order to determine its impact on the conservation status of the population concerned on a larger scale. Indeed, because a derogation must respond to a specific problem in a particular situation, (40) its most direct effects are, by definition, likely to be felt in the local area to which it relates. The conservation status of a population at national or biogeographical level depends on the cumulative effects of the various derogations affecting local areas and any other causes of mortality resulting from humans intervening locally. (41)

84. In contrast, I do not concur with the thesis, which the Agency advanced before the referring court, that, in order to demonstrate that the requirement under examination here is satisfied in the present case, it is sufficient to establish that the derogation permit does not jeopardise maintenance of the wolf population at a favourable conservation status in its natural range defined at transboundary level. Although the Agency did not specify the extent of the natural range of the wolf population in question, it is apparent from the information provided by Tapiola that it can cover certain parts of the territories of Finland and Russia. (42)

85. On that point, I would recall, in the first place, that the Habitats Directive is intended only to ensure the conservation of populations of species of Community interest in the territory of the Member States. Secondly, third countries are not bound by the obligations of strict protection of those species arising from that directive. In practice, therefore, a Member State is not able to verify or reasonably predict the number and type of individuals of those species whose killing a third country may authorise or tolerate. (43) Since the impact of a derogation permit on the conservation status of a population depends on the cumulative effect of the various causes of mortality attributable to humans, that impact cannot be assessed at the level of a territory that crosses the borders of a third country.

86. That approach seems to underlie the Court's finding in its judgment of 14 June 2007, *Commission v Finland*. (44) As Tapiola has noted, in that judgment the Court made a finding on the conservation status of wolves only at the level of Finnish territory, without examining it at the level of the transboundary population.

87. That conclusion does not prejudge whether or not a Member State can establish that the population in question is at a favourable conservation status, where its natural range straddles the

territory of several Member States, by proving that it is at that status at the level of the transboundary area concerned. (45)

88. I conclude from the foregoing that, in a situation such as that at issue in the main proceedings, no derogation permit can be granted under Article 16(1) of the Habitats Directive unless the conservation status of the populations of the species concerned, and the impact that the envisaged derogation permit is capable of having on that status, have been assessed, at the level of the territory of the Member State as a whole or of the biogeographical region within that State in which the derogation permit is intended to be implemented.

2. Scope of the requirement that the derogation be without detriment to maintenance of the populations concerned at a favourable conservation status

89. By points (b) and (c) of its third question, which I will examine together, the referring court enquires whether Article 16(1) of the Habitats Directive necessarily precludes the grant of a derogation permit where the conservation status of the populations of the species concerned is unfavourable.

90. The wording of that article, in so far as it refers to ‘maintenance of the populations [to which a derogation relates] at a favourable conservation status’, might suggest that the favourable conservation status of those populations is a precondition for granting a derogation permit.

91. The Court of Justice nevertheless rejected such an interpretation in its judgment of 14 June 2007, *Commission v Finland*. (46) In that judgment it held that the aforementioned requirement is satisfied, even where the populations concerned are not at a favourable conservation status, provided it is duly established that the derogation is not such as to *worsen* their unfavourable conservation status *or to prevent* their restoration at a favourable conservation status. It is therefore sufficient for the derogation to be, at least, neutral in terms of the species’ conservation status — a scenario that arises, according to the Court of Justice, in exceptional circumstances.

92. I would add that the provisions of the Habitats Directive must be interpreted in the light of the precautionary principle enshrined in Article 191(2) TFEU, (47) referred to by Tapiola and the Commission. That principle means that if after examining the best scientific data available significant doubt remains as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of the species concerned at a favourable conservation status, the Member State must refrain from granting or implementing that derogation. (48)

3. The impact of the management plan and the national rules determining the maximum number of individuals that can be killed

93. By point (a) of its first question, the referring court asks whether it is relevant, for the purposes of assessing whether a derogation permit is compatible with Article 16(1)(e) of the Habitats Directive, that it is governed by a management plan and national rules that set a maximum quota of specimens that can be killed on national territory under that article for a given hunting year.

94. In common with Tapiola, the Agency, the Finnish and Danish Governments and the Commission, that circumstance is in my view a relevant factor for that purpose. Setting a maximum number of animals whose capture or killing can be authorised in that territory can indeed ensure that the annual cumulative effect of individual derogations is not detrimental to the maintenance or restoration of the populations of the species concerned at a favourable conservation status. (49) Moreover, the Commission’s guidance document recommends adopting management plans because they represent ‘the best way of demonstrating compliance with the strict requirements of Article 16 [of the Habitats Directive]’. (50)

95. Of course, in order to do so, the detailed provisions of the management plan and rules in question must actually ensure compliance with those requirements. In particular, if the killing of a

number of specimens filling the pre-established maximum quota is to comply with those requirements, that quota must have been set having regard to the cumulative effect of the derogation permits under Article 16(1)(e) of the Habitats Directive, of those granted under other grounds of derogation and of other causes of mortality attributable to humans. (51) As Tapiola noted, in terms of the conservation status of the population concerned, all that counts is the number and type of specimens that died, whilst the cause of their death is irrelevant.

96. In the present case, the Agency stated, in the contested decisions, that the ceiling of 46 specimens established in Article 1 of Regulation No 1488/2015 ensured that there was no threat to the maintenance or restoration of the wolf population at a favourable conservation status.

97. Tapiola and the Commission question that finding in the light, in particular, of the data set out in point 66 of this Opinion. First, Tapiola asserts that this ceiling was too high given the size of the wolf population and its conservation status. Secondly, it alleges that the hunting for population management purposes, contrary to the recommendations in the management plan and the derogation permits granted under it, targeted a significant number of breeding specimens. Nearly half the 43 or 44 wolves killed under those derogation permits — and, in particular, four out of the seven wolves killed by Mr Mustonen and Mr Ruhanen — were, according to Tapiola, breeding specimens. I note that according to the management plan, the viability of a wolf pack requires that only non-breeding specimens be hunted. (52) Tapiola and the Commission observe that the wolf population fell drastically after the aforementioned derogation permits were implemented.

98. The data to which they refer, assuming that they are confirmed by the referring court, constitute strong circumstantial evidence that the maximum quota pre-established in the Finnish rules, together with the fact that there was no prohibition on killing breeding specimens, did not ensure that the derogation permits granted within the limits of that quota, which included those at issue in the main proceedings, were not detrimental to the maintenance or restoration of the wolf population at a favourable conservation status.

D. The scope of the specific requirements set out in Article 16(1)(e) of the Habitats Directive

99. Under Article 16(1)(e) of the Habitats Directive, recourse to the ground of derogation under that article is subject to compliance with requirements that specimens be taken on a selective basis, that the number of specimens taken be limited and specified and that the conditions under which they are taken be strictly supervised. In order to reply fully to the first question referred, the Court of Justice will have to provide the referring court with a number of clarifications as to the content of those requirements in a situation such as that in the main proceedings.

100. As the foregoing shows, the general condition under Article 16(1) of that directive that must be satisfied for any derogation to be granted, that the derogation must not be detrimental to the maintenance or restoration of the populations concerned at a favourable conservation status, of itself imposes a number of restrictions on the number and, potentially, the types of specimens that can be taken.

101. In order to give the specific requirements set out in Article 16(1)(e) distinct content and thereby ensure that they remain effective, those requirements must in my view be interpreted as, additionally, limiting the power to derogate from the obligations of strict protection of the populations of the species concerned *even where the derogation envisaged does not prevent the maintenance or restoration of those populations at a favourable conservation status*.

102. In that vein, the Commission guidance document states that the ground of derogation under Article 16(1)(e) of the Habitats Directive is subject to ‘significant’ constraints in addition to the grounds of derogation set out in the other paragraphs of Article 16(1), although its application ‘in practice seems exceptional’. (53)

103. In that document the Commission is proposing, in my view correctly, a test according to which

a derogation cannot be granted under Article 16(1)(e) of the Habitats Directive where there is a risk that it might have ‘a significant negative effect on the population concerned in quantitative or in qualitative (e.g. a negative impact on population structure) terms’. (54) Where there is such a risk, the derogation cannot be granted even if it would not affect the population to the point of preventing its maintenance or restoration at a favourable conservation status.

104. The scope of the three specific requirements set out in Article 16(1)(e) must be determined in the light of those considerations.

105. First, the case-law on the comparable requirement relating to the taking of specimens ‘in small numbers’, set out in Article 9(1)(c) of the Birds Directive can shed light on how to interpret the requirement that the captures and killings authorised under Article 16(1)(e) of the Habitats Directive be ‘in limited numbers’.

106. The Court of Justice has held in that respect that the number of birds that can be hunted under Article 9(1)(c) depends on the population level of the species, its conservation status and its biological characteristics. That number must be determined on the basis of geographic, climatic, environmental and biological factors and an assessment of the situation regarding the species’ reproduction and total annual mortality rate owing to natural causes. (55)

107. Secondly, according to the Commission guidance document, (56) the requirement that specimens of the species concerned be taken selectively refers primarily to the targeting of one species to the exclusion of all others. (57) To my mind, that requirement, interpreted in the light of the general scope of the specific requirements set out in Article 16(1)(e) of the Habitats Directive, as described in point 103 of this Opinion, can also, depending on the circumstances, necessitate more precise targeting of specimens or determined categories of specimens. (58)

108. From that perspective, the necessary degree of selectivity, likewise, as the Danish and Swedish Government and the Commission, have, in essence, argued, depends on the level of the population concerned, its conservation status and its biological characteristics. (59) For certain species or populations it may prove necessary to target individually identified specimens, on the basis of certain biological traits (in particular for genetic reasons or based on their role within the group) (60) or because they belong to group of specimens living in a particular territory.

109. Thirdly, the requirement that derogation permits under Article 16(1)(e) of the Habitats Directive be implemented under strictly supervised conditions implies, in particular, that those conditions and the manner in which their compliance is monitored must ensure that the species concerned are taken on a selective basis and in limited numbers.

110. The Court has already held in that respect that the administrative procedures must be organised in such a way that both the decisions authorising hunting derogations under Article 9(1)(c) of the Birds Directive and the manner in which those decisions are applied are subject to effective control exercised in a timely manner. (61)

111. The Commission guidance document corroborates that approach when it states that derogations must involve clear authorisations indicating the individuals or groups of individuals that can be killed and their number, and the places and dates of the authorised hunting. (62) Furthermore, in relation to any derogation under Article 16(1) of the Habitats Directive, the competent national authority must ensure that the conditions in it are met before it is granted and must monitor its impact after it is implemented. (63)

112. It will be for the referring court to determine whether the Agency has established, on the basis of scientific data, that the territorial and quantitative limits imposed on the derogation permits, having regard also to the manner in which compliance with those limits was monitored, were sufficient to ensure that they did not have a significant adverse impact on the conservation status of the wolf population. In my view it is unlikely that it has done so, given, first, the large number of

specimens targeted compared with the total wolf population according to the figures put forward by Tapiola and the Commission (assuming they are confirmed) (64) and, secondly, the fact that there was no prohibition on hunting breeding specimens.

V. Conclusion

113. Having regard to all the foregoing, I propose that the Court should answer the questions referred by the Korkein hallinto-oikeus (Supreme Administrative Court, Finland) for a preliminary ruling as follows:

- 1) Article 16(1)(e) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Council Directive 2013/17/EU of 13 May 2013 does not preclude a Member State from derogating from its obligation, under Article 12(a) of that directive, to ensure that it prohibits the intentional killing of specimens of the species referred to in Annex IV (a) to that directive, which include the species *Canis lupus*, by authorising the hunting of wolves with the aim of combating poaching, preventing harm to dogs and/or improving the general feeling of security of the population, provided that Member State demonstrates that all the requirements set out in Article 16(1)(e) of that directive are satisfied.
- 2) Article 16(1) of Directive 92/43, as amended by Directive 2013/17, in so far as it provides that a derogation under that provision can only be granted if there is no satisfactory alternative, must be interpreted as meaning that a Member State must, for that purpose, identify clearly and precisely in the derogation decision the objectives being pursued by means of the derogation, establish that the derogation is capable of achieving those objectives and demonstrate that there is no alternative means of achieving them.
- 3) Article 16(1) of Directive 92/43, as amended by Directive 2013/17, in so far as it provides that a derogation permit under that provision can only be granted with the proviso that it is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range, must be interpreted as meaning as follows:
 - that it precludes a Member State from granting such a derogation permit where the conservation status of the population of the species concerned has only been assessed at the level of the local area to which the derogation permit relates, and no assessment has been carried out at the level of that Member State or of the biogeographical region to which the derogation permit relates within that Member State;
 - that it does not preclude a Member State from granting such a derogation permit where the conservation status of the population of the species concerned is unfavourable, provided the derogation permit does not further worsen that status or prevent that population from being restored at a favourable conservation status;
 - that the fact that a derogation permit under Article 16(1)(e) of Directive 92/43/EEC, as amended by Directive 2013/17, is granted in the context of a national management plan and national rules that set a maximum annual quota of specimens that can be killed in national territory under that article only ensures that the condition is met to the extent that the quota in question is set at a level such that, if the number of derogation permits granted reaches the upper limit of that quota, taking into account also any derogation permits granted under Article 16(1)(a) to (d) of that directive and other causes of mortality attributable to humans, their grant is not detrimental to the maintenance or restoration of those populations at a favourable conservation status.
- 4) Article 16(1)(e) of Directive 92/43, as amended by Directive 2013/17, in so far as it provides that a derogation under that article can be granted in order 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 to that directive in limited numbers specified by the competent national authorities, must be interpreted as meaning that those authorities must, before its adoption, establish that there is no risk that such a derogation will have a significant adverse impact on the conservation status of the population concerned. Any such risk must be ruled out by limiting the number of specimens to which the derogation relates and requiring that it be implemented selectively, on the basis of detailed specifications that will depend on the level of that population, its conservation status and its biological characteristics. Those conditions must be precisely defined in the derogation decision. Satisfaction of those conditions must be strictly supervised.

1 Original language: French.

2 Council Directive of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7), as amended by Council Directive 2013/17/EU of 13 May 2013 (OJ 2013 L 158, p. 193).

3 The population management plan is available at: https://mmm.fi/documents/1410837/1720364/Suomen_susikannan_hoitosuunnitelmat.pdf/cf2138e7-6a9b-4955-9b93-d719c734590f.

4 As the Court of Justice has already held, Articles 12, 13 and 16 of the Habitats Directive form a coherent body of provisions intended to protect the populations of the species concerned. Any derogation incompatible with Article 16(1) of that directive would therefore also infringe Article 12 or 13. See judgment of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, paragraph 112).

5 I do not share the view expressed by Tapiola that the concept of ‘taking’ within the meaning of Article 16(1)(e) of the Habitats Directive does not include the killing of specimens of the species concerned. As the other interested persons that have submitted observations to the Court of Justice have argued, that concept is a generic term that covers both capture and killing. As the Danish and Swedish Governments assert, use of that term can be explained, inter alia, by the fact that the species to which Annex IV to that directive refers include not only animal species but plant species for which the expression ‘killing’ would be inappropriate. The guidance document on the strict protection of animal species of Community interest under the Habitats Directive (February 2007, http://ec.europa.eu/environment/nature/conservation/species/guidance/pdf/guidance_en.pdf, p. 59, paragraph 33, ‘the Commission guidance document’) bears out that interpretation. Although it is not binding, that document contains detailed indications that can shed light on how to interpret the Habitats Directive. The interpretation I am advocating also emerges from applying by analogy the case-law on Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7, ‘the Birds Directive’). The Court of Justice in fact found that Article 9(1)(c), which allows derogations from the protection obligations under that directive in circumstances comparable to those set out in Article 16(1)(e) of the Habitats Directive, can justify giving permission for the hunting of wild birds (see, in particular, judgments of 16 October 2003, *Ligue pour la protection des oiseaux and Others* (C-182/02, EU:C:2003:558, paragraph 10), and of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770, paragraph 31)).

6 See, to that effect, judgments of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, paragraph 111); of 10 May 2007, *Commission v Austria* (C-508/04, EU:C:2007:274, paragraph 110); and of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, paragraph 25).

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

also, in particular and by analogy, judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 34), and of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraph 47).

[8](#) See footnote 5 of this Opinion.

[9](#) See, to that effect, judgment of 20 October 2005, *Commission v United Kingdom* (C-6/04, EU:C:2005:626, paragraph 25). See, also, Commission guidance document, p. 53, paragraph 4.

[10](#) See judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 25), and of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraph 62).

[11](#) See, in particular, points 54, 71, 106 and 110 of this Opinion.

[12](#) See, to that effect, Opinion of Advocate General Kokott in *Commission v Finland* (C-342/05, EU:C:2006:752, point 24).

[13](#) See, to that effect, Commission guidance document, p. 60, paragraph 36. It seems to me that a test of ‘proportionality in the strict sense’, consisting of verifying that the disadvantages caused are not disproportionate to the aims pursued, is already included in the requirement, likewise established in the introductory part of Article 16(1) of the Habitats Directive, that a derogation must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status (see point 77 et seq. of this Opinion). In that way Article 16(1) lays down the limit beyond which the balance to be struck between the interests of protecting the species and the opposing interests must necessarily tip in favour of the interests of protecting the species.

[14](#) For example, a Member State could rely on Article 16(1)(e) of the Habitats Directive with the aim of preventing particular damage or nuisances not reaching the threshold required to qualify as ‘significant’ damage within the meaning of Article 16(1)(b). Furthermore, the objective of species conservation, whilst it can also be pursued under Article 16(1)(a) or (d) of the Habitats Directive, could justify a derogation under Article 16(1)(e) where the beneficial effect expected from the derogation on the conservation status of the species is not sufficiently established to allow Article 16(1)(a) or (d) to be applied (I will return to this question in point 61 et seq. of this Opinion).

[15](#) See Article 2(3) of the Habitats Directive.

[16](#) See Article 2(2) of the Habitats Directive. See, also, to that effect, judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, paragraph 29).

[17](#) See, on that point, Commission guidance document, p. 56, paragraph 14.

[18](#) See, to that effect, Opinions of Advocate General Kokott in *Commission v Finland* (C-342/05, EU:C:2006:752, point 25) and of Advocate General Sharpston in *Commission v Malta* (C-557/15, EU:C:2017:613, point 67). What is more, the fact that the objectives of the derogation are identified clearly and with supporting evidence means that a Member State cannot define the problem that it seeks to address artificially so as to exclude other potential satisfactory solutions (see Opinion of Advocate

General Sharpston in *Commission v Malta* (C-557/15, EU:C:2017:613, point 68)).

[19](#) See, amongst others, judgments of 8 July 1987, *Commission v Belgium* (247/85, EU:C:1987:339, paragraph 7); of 7 March 1996, *Associazione Italiana per il WWF and Others* (C-118/94, EU:C:1996:86, paragraph 21); and of 11 November 2010, *Commission v Italy* (C-164/09, not published, EU:C:2010:672, paragraph 28). See, also, Commission guidance document, p. 56, paragraph 14.

[20](#) In that respect, the Commission contends that no wolf has attacked a human for nearly a century. According to the data available to Tapiola, no attack on a human by a wolf has been recorded in Fennoscandia since the Second World War.

[21](#) See point 52 and footnote 14 of this Opinion.

[22](#) That evidence may include sociological studies carried out in the Member State in question and scientific data relating to the consequences for the conservation status of wolves of authorised hunting for population management purposes in other countries.

[23](#) See, to that effect, amongst others, judgments of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44); of 8 November 2016, *Lesoochranárske zoskupenie VLK* (C-243/15, EU:C:2016:838, paragraph 66); and of 17 April 2018, *Commission v Poland (Białowieża Forest)* (C-441/17, EU:C:2018:255, paragraph 117). Those judgments concerned Article 6(3) of the Habitats Directive in so far as it establishes that a plan or project not directly connected with or necessary to the management of a ‘Natura 2000’ site but likely to have a significant effect on that site can be authorised only to the extent that the competent authority has satisfied itself that the plan or project will not adversely affect the integrity of that site. The principles that the Court of Justice identified in those judgments are to my mind applicable by analogy to interpretation of Article 16(1) of that directive since according to that article any derogation from the obligations of strict protection relating to species of Community interest can only be granted if it is not detrimental to maintenance of the populations of those species at a favourable conservation status in their natural range.

[24](#) See points 89 to 92 of this Opinion.

[25](#) Tapiola refers, in particular to the articles by Benítez-López, A., Alkemade, R., Schipper, A.M., Ingram, D.J., Verweij, P.A, Eikelboom, J.A.J., and Huijbregts, M.A.J., ‘The impact of hunting on tropical mammal and bird populations’, *Science*, 356 (6334), 2017, pp. 180-183 and by Epstein, Y., ‘Killing Wolves to Save Them? Legal Responses to “Tolerance Hunting” in the European Union and United States’, *Review of European Community & International Environmental Law*, vol. 26, no 1, 2017, pp. 19-29. The Commission also cites that last article.

[26](#) Management plan, p. 15.

[27](#) C-342/05, EU:C:2007:341, paragraph 42.

[28](#) See point 44 of this Opinion and the judgment of 14 June 2007, *Commission v Finland* (C-342/05, EU:C:2007:341, paragraph 31).

[29](#) That obligation also follows from Article 16(3)(a) of the Habitats Directive, according to which the reports on implementation of the derogations under Article 16(1), which the Member States must submit to the Commission under Article 16(2), must mention ‘the reason for the derogation ..., with, if appropriate, a reference to alternatives rejected and scientific data used’.

[30](#) Judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraphs 50 and 51). See, also, Commission guidance document, p. 61, paragraph 40.

[31](#) By way of illustration, the Commission mentions the LIFE programme implemented in the Alps region (see the website <http://www.lifewolfalps.eu/en/anti-poaching/>).

[32](#) Tapiola also notes that other Member States, that is to say, the Federal Republic of Germany and the Kingdom of Sweden, have granted derogations under Article 16(1)(e) of the Habitats Directive intended to prevent poaching without killing wolves. To my mind, the fact that other Member States have been able to resolve an identical problem without resorting to a derogation permit, if that is the case, whilst not of itself conclusive, is strong circumstantial evidence that there is an alternative solution to the derogation envisaged. See, to that effect, by analogy, Opinion of Advocate General Fennelly in *LRBPO and AVES* (C-10/96, EU:C:1996:430, point 39).

[33](#) See, to that effect, Commission guidance document, p. 62, paragraph 43.

[34](#) C-342/05, EU:C:2007:341, paragraph 27.

[35](#) As regards Finnish territory, I would note that the species *Canis lupus* is only a strictly protected species of Community interest outside the reindeer herding area (see Annex IV (a) to the Habitats Directive).

[36](#) Commission guidance document, p. 62, paragraph 43. See, also, the document prepared by the Large Carnivore Initiative for Europe (LCIE) group of experts entitled ‘Guidelines for Population Level Management Plans for Large Carnivores’ (1 July 2008, http://ec.europa.eu/environment/nature/conservation/species/carnivores/pdf/guidelines_for_population_level_management.pdf, ‘the LCIE guidelines’, pp. 7-8). Those guidelines were prepared on the instructions of the Commission in order to reflect good practice in the management of large carnivores. The Commission therefore recommends the guidance it contains to the Member States (see Commission, ‘Note to the Guidelines for Population Level Management Plans for Large Carnivores’, 1 July 2008, http://ec.europa.eu/environment/nature/conservation/species/carnivores/pdf/guidelines_for_population_level_management_ec_note.pdf). That document, although not binding, also provides relevant guidance for interpreting the Habitats Directive.

[37](#) Commission guidance document, p. 11, paragraph 19. According to the LCIE guidelines (p. 9), those limits can reach several hundreds of square kilometres in the case of a wolf population.

[38](#) See Commission guidance document, p. 63, paragraphs 45 and 46, and the LCIE guidelines, p. 22. Under Article 1(c)(iii) of the Habitats Directive, the territory of the European Union comprises nine biogeographical regions, that is to say, the Alpine, Atlantic, Black Sea, Boreal, Continental, Macaronesian, Mediterranean, Pannonian and Steppic regions. The document entitled ‘Reporting Under Article 17 of the Habitats Directive — Explanatory Notes and Guidelines for the Period 2013-2018’ (May 2017, http://cdr.eionet.europa.eu/help/habitats_art17, p. 18) provides that, where the territory of a Member

State covers several biogeographical regions, the reports on application of the Habitats Directive, which must be filed every 6 years under Article 17(1) of that directive, must contain an assessment at the level of each of those regions. The scope of the obligation to examine the conservation status of populations of species of Community interest under Article 16(1) of that directive therefore reflects the scope of the surveillance and reporting obligations on the Member States under Article 17(1) of the same directive.

[39](#) Commission guidance document, p. 63, paragraph 46. In that document the Commission recommends assessing the conservation status of a population at local level and, subsequently, looking at that status in relation to the situation prevailing at national or biogeographical level.

[40](#) See point 54 of this Opinion.

[41](#) See point 95 of this Opinion.

[42](#) I also note that, according to Table 4 of the LCIE guidelines and their and Appendix 1 (pp. 48, 65 and 66), the wolves living in Finnish territory form part of the Karelian (Russian) population, which includes wolves in Finland and in part of Russian territory. See also, Commission, 'Key actions for large carnivore populations', 4 February 2015, http://ec.europa.eu/environment/nature/conservation/species/carnivores/pdf/key_actions_large_carnivores_2015.pdf, p. 46. Even so, the order for reference does not indicate that the Agency demonstrated that the population defined in that way was at a favourable conservation status.

[43](#) This is all the more so where the third country in question is not a party to the Convention on the Conservation of European Wildlife and Natural Habitats signed at Bern on 19 September 1979, concluded on behalf by the Community by Decision 82/72/EEC of 3 December 1981 (OJ 1982 L 38, p. 1) ('the Bern Convention') as is the case with, amongst others, Russia.

[44](#) C-342/05, EU:C:2007:341, paragraph 27.

[45](#) The LCIE guidelines (pp. 23, 26 and 27) advocate such an approach and highlight the importance of cooperation between States for the purpose of managing populations of large carnivores. See, also, to that effect, Commission guidance document, p. 63, paragraph 46.

[46](#) C-342/05, EU:C:2007:341, paragraph 29.

[47](#) Judgment of 7 September 2004, *Waddenvereniging and Vogelbeschermingsvereniging* (C-127/02, EU:C:2004:482, paragraph 44).

[48](#) See point 63 of this Opinion.

[49](#) See, on that point, LCIE guidelines, p. 31.

[50](#) Commission guidance document, p. 59, paragraph 33 (see, also, p. 65, paragraph 54). See, also, LCIE guidelines, pp. 30-31.

[51](#) See the document entitled ‘LCIE Policy Support Statement — Lethal Control and Hunting of Large Carnivores’, annexed to the LCIE guidelines, p. 72.

[52](#) See point 21 of this Opinion.

[53](#) Commission guidance document, p. 58, paragraph 26, and p. 59, paragraph 30.

[54](#) Commission guidance document, p. 58, paragraph 28.

[55](#) See judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraphs 25 and 29), and of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraph 62). The Court found that, in order to determine whether the requirement relating to the taking of birds ‘in small quantities’ under Article 9(1)(c) of the Birds Directive had been complied with, a percentage in the order of or less than 1% of the total annual mortality, depending on whether or not the species could be hunted, constituted a benchmark in the light of the available scientific studies (see, amongst others, judgments of 15 December 2005, *Commission v Finland* (C-344/03, EU:C:2005:770, paragraphs 53 and 54), and of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraphs 63 to 65 and the case-law cited)).

[56](#) Commission guidance document, p. 59, paragraph 32.

[57](#) See, also, to that effect, Revised Resolution No 2 (1993) on the scope of Articles 8 and 9 of the Bern Convention on the Conservation of European Wildlife and Natural Habitats, adopted on 2 December 2011, (T-PVS (2011), p. 36), p. 38. That resolution is an interpretative document relating to the Bern Convention. Since the Habitats Directive is to a large extent based on that convention (see, in that respect, Opinion of the Economic and Social Committee on the proposal for a Council Directive on the protection of natural and seminatural habitats and of wild fauna and flora and on the Supplementary Annexes (OJ 1991 C 31, p. 1, paragraph 1.2) and the Commission guidance document, pp. 7- 8, paragraphs 7 and 8), that resolution, and the annex to it in particular, can provide the Court with guidance for interpreting that directive.

[58](#) In that respect I draw attention to the fact that, according to the Guide to sustainable hunting under the Birds Directive (2008, http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf, p. 67), the selectivity requirement under Article 9(1)(c) of that directive refers to the species, or even the sub-species, gender or age class to which the derogation relates.

[59](#) That is the case without prejudice to the need in principle, highlighted by the Danish Government and the Commission, to hunt specifically the specimen that is causing problems where the derogation is intended to prevent particular damage. That requirement already follows, however, from the condition that there must be no satisfactory alternative (in the context, specifically, of the test of whether the derogation is capable of preventing damage, as described in points 68 and 69 of this Opinion).

[60](#) According to the Commission, breeding wolf specimens should be preserved because of their primordial role in the equilibrium of the pack. See also the Opinion of Advocate General Kokott in *Commission v Finland* (C-342/05, EU:C:2006:752, point 49).

[61](#) See, to that effect, judgment of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378,

paragraph 47).

[62](#) Commission guidance document, p. 59, paragraph 31.

[63](#) That obligation is also apparent from Article 16(3)(d) and (e) of the Habitats Directive, which requires the reports by the Member States referred to in Article 16(2) to specify ‘the authority empowered to declare and check that the required conditions obtain’ and the ‘supervisory measures used and the results obtained’. See, also, Commission guidance document, p. 67, paragraph 59.

[64](#) See point 66 of this Opinion.