One objective to rule them all: Swedish wolf hunting under the legal-epistemic framework of the Habitats Directive

*Mar Ouro-Ortmark**

Abstract

This paper assesses the tensions between the legal-epistemic framework created by the Habitats Directive and its national implementation into preexistent legal paradigms. To this end, the illustrative case of the 2023 Swedish wolf hunt is analyzed under the lens of the Habitats Directive and the Tapiola case, since an infringement proceeding has been ongoing for over twelve years and numerous scholars have been critical towards the compatibility of these policies with EU law. Conclusions point towards the importance of proper EU legal transpositions, which cannot consist in a piecemeal approach where key epistemic paradigms, generally entrenched in the objectives of the law, are disregarded for the sake of avoiding controversy. If not, environmental international instruments run the risk of being circumvented, and species protection of being overshadowed by prior, arguably outdated laws in the face of a global biodiversity crisis.

Keywords: Biodiversity conservation, large carnivore conservation, epistemology, Habitats Directive, Tapiola case, wolf hunting

1. Introduction

The wolf is a strictly protected species in most Member States of the EU according to the Habitats Directive.[1] However, the same Directive has given differing results in countries with apparently similar legal systems. This dichotomy between shared legal landscapes and diverging material realities, points towards the importance of the transposing process of EU law when it crosses national boundaries. It is in the interface between these two levels, where critical nuances (mostly epistemological) trickle down or get lost in the confluence.

In this sense, I intend to analyze the 2023 Swedish wolf license hunt under the lens of this filtering process, therefore shedding some light on the grey zone of (un)transposed legal-epistemological frameworks, defined in section 1.1.1. In order to do this, the *Tapiola* case[2] offers a good starting point because it addresses tolerance hunting policies, i.e. allowing the killing of a protected species to increase public support for its conservation. Since this reasoning lies behind the hunting policies of both cases, I intend to analyze the capacity of the Directive, when read under the light of the *Tapiola* case, to frame hunting policies inside legal boundaries that are informed by sound ecological knowledge. In doing so, I explore the tensions arisen in the episte-

* Doctoral student, Uppsala University Faculty of Law (mar.ouro.ortmark@jur.uu.se).

[1] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora OJ L206/7 (hereafter Habitats Directive or HD).

[2] C-674/17 *Luonnonsuojeluyhdistys Tapiola* [2019] ECLI:EU:C:2019:851.

mological transposition of the Habitats Directive into the Swedish legislation with regards to the Swedish wolf.

1.1 The importance of diverging ontologies

Nature is a concept subject to varying meanings, where the boundaries between humans and wildlife are being diminished in the face of the Anthropocene.[3] Meanwhile, biodiversity conservation initiatives are deploying a broad set of ideas where law is being used as a way to drive systemic change. Indeed, species protection legislation is being enacted to abate the anthropogenic global biodiversity crisis, deemed as the Sixth global mass extinction.[4] However, these regulations[5] are being put in the place of existing legal systems with different understandings of what nature is or ought to be, hereinafter referred to as ontologies[6], and tensions have come up when the time has come to decide what is to be protected as nature.

A good example of conflicting conceptualizations of nature can be seen in large carnivore conservation: while natural sciences have demonstrated the importance of apex predators for the health of ecosystems,[7] this has collided with the idea of nature held by some communities. This is the case, for example, of Sweden, where hunters consider large carnivores as competitors for game species and a threat towards hunting traditions.[8] However, the EU counts on a single Directive to rule on biodiversity conservation for all 27 Member States, and the meaning given to biodiversity, and to Nature by extension, is set in a rather clear and unambiguous manner.

While the Habitats Directive interprets biodiversity as something worth protecting sometimes even beyond certain traditions,[9] some Member States have tried to harmonize this paradigm with that of a more old-fashioned, anthropocentric, understanding of wildlife. Though this harmonization has been successful in some instances, large carnivores have stood as a reminder of the frictions between old ontologies and new ones.[10] Meanwhile, biodiversity is declining at an unprecedented rate, and measures enacted require a shift in mindset which is not happening at the same speed everywhere, even less in those countries recently recolonized by controversial species such as the wolf. To illustrate this example, while Italy counts on 3300 wolves and does not even allow wolf hunting to protect livestock,[11] Sweden has barely 419 wolves and allows, on top of other types of lethal management, hunting quotas of up to 75 wolves for the year 2023.[12] If we consider that the Scandinavian countries have traditionally been es-

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[3] Telmo Pievani, 'The Sixth Mass Extinction: Anthropocene and the Human Impact on Biodiversity' (2014) 25 Rendiconti Lincei 85.

[4] Ibid.

[5] Habitats Directive (n. 1); 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.

[6] Johanna Parikka Altenstedt, 'Vargens plats: Gynnsam bevarandestatus lokalt, nationellt eller i hela EU?' (Master thesis, Örebro University 2020) <diva2:1458184> accessed January 1 2024 (Swedish) 4.

[7] Andrés Ordiz and others, 'Effects of Human Disturbance on Terrestrial Apex Predators' (2021) 13 Diversity 68.

[8] Ilpo Kojola and others, 'Can Only Poorer European Countries Afford Large Carnivores?' (2018) 13 PLOS ONE e0194711 <https://doi.org/10.1371/journal.pone.0194711> accessed January 1 2024.

[9] C-10-96 *LRBPO and AVES v Région Wallonne* [1996] ECR I-06775, Opinion of AG Fennelly, para. 36; C-900/19 *Association One Voice and Ligue pour la protection des oiseaux* [2021] ECLI:EU:2021:211, para. 44.

[10] *See* Mari Pohja-Mykra, 'Felony or act of justice? Illegal killing of large carnivores as defiance of authorities' [2016] Journal of Rural Studies 46, for an analysis of the legitimacy crisis of carnivore conservation policies in Finland.

[11] Large Carnivore Initiative for Europe, 'Assessment of the conservation status of the Wolf (*Canis lupus*) in Europe' (Bern Convention Standing Committee 2022) T-PVS/Inf(2022)45 (hereafter LCIE Assessment).

[12] Länsstyrelsen Dalarnas Län Case No 218-13073-2022 (Swedish) 19.

pecially hostile to the existence of the wolf,[13] we can soon realize that there is a strong ontological substratum to an apparently legal conflict.

In this article, I build on the work done by journalist and jurist Parikka Altenstedt[14], which discusses the role of the Swedish ontology in the deficient transposition of the Habitats Directive in national law with regards to the wolf's habitat. However, where Parikka Altenstedt considers the *Tapiola* ruling as a supra-national EU solution to the ontological dichotomy between EU and Swedish legislation, I consider the *Tapiola* decision as the product of a strict interpretation of the Directive's objectives, which, rather than trying to encompass other worldviews with regards to Nature, merely emphasizes the legal boundaries already present in the main Directive.

1.1.1 The epistemological framework of the Habitats Directive

First of all, I shall define what I mean by "epistemological frameworks". Laws tend to establish a set of objectives, and the Habitats Directive is not an exception, establishing the objective of conserving biodiversity in article 2. The objective/s of the law, also referred to as the goal/s, are no more than a statement of values: we establish the legal objective of conserving biodiversity because we believe this is something worth being achieved. Thus, this value (that biodiversity is worth being protected) delimitates what is legally relevant, and therefore, what knowledge is relevant as well. Ergo, the objectives of a law guide the pursuit of knowledge. This is what I refer to as epistemological frameworks, because they establish what is legally relevant under the law. The law is indifferent to certain elements of reality which are not included in its scope and, although these do not disappear because of their legal exclusion, they do become less relevant for the assessment of the judge. He or she must abstract from his or her sociological background, and apply the epistemological framework (what is legally relevant) established by the law. The objectives of the law, therefore, restrain the discretion of the judge.

As Karl Popper argued, our reality is conditioned by the object observed, which sets the perspective. According to Popper,

> Observation is always selective. It needs a chosen object, a definite task, an interest, a point of view, a problem. And its description presupposes a descriptive language, with property words; (…) 'A hungry animal', writes Katz, 'divides the environment into edible and inedible things. An animal in flight sees roads to escape and hiding places'.[15]

If we change some words from the previous quote, we can see that epistemological frameworks play an analogous role when applying the law:

> [Legislation] is always selective. It needs a chosen object, a definite task, an interest, a point of view, a problem. And its description presupposes a descriptive language [for example, the notion of Favourable Conservation Status], with property words; (…) A [species protection law], divides the world into [protected and unprotected species]. [A hunting law] sees [rights to hunt and hunting seasons].

[13] Erica Von Essen and others, 'The Radicalisation of Rural Resistance: How Hunting Counterpublics in the Nordic Countries Contribute to Illegal Hunting', (2015) 39 Journal of Rural Studies 199.

[14] Parikka Altenstedt (n. 6).

[15] Karl Popper, *Conjectures and Refutations: The Growth of Scientific knowledge* (Routledge 2002), 61–62.

Different objectives can guide the pursuit of different types of knowledge: in hunting legislations, the objective is to ensure the continuing availability of game for hunting, so the act of hunting is the 'chosen object', and, as a sociological practice, it can guide the pursuit of knowledge within the social sciences realm. Species protection legislation, such as the Habitats Directive, has the objective of conserving biodiversity, so the "chosen object" is biodiversity. Thus, the law guides relevant knowledge towards the realm of ecology, as the CJEU emphasized in the Tapiola case.[16] Moreover, while hunting legislations establish what can be killed and how, species protection regulations establish what should be protected and how. This is relevant for the Swedish case, since the Habitats Directive's wolf protection regime is transposed into hunting regulations. Thus, a paradox is constructed between these two bodies of law, one observing what is protectable and another what is killable. Whether the Habitats Directive provisions on strictly protected species can, therefore, be transposed directly in a hunting legislation with such a different epistemological framework, is what this paper will try to address.

To summarize, I argue that the Habitats Directive establishes an epistemological framework in the midst of the differing ontologies that may predominate in a specific place or courtroom. By epistemological framework I intend to describe how, and most importantly what, the legislator requires Member States to observe. The epistemological framework of the Habitats Directive is established in article 2.1 when it says that 'The aim of this Directive shall be to contribute towards ensuring bio-diversity through the conservation of natural habitats and of wild fauna'. This is followed by a specification in article 2.2, establishing favourable conservation status for listed habitats and species as the specific outcome that measures should pursue. Finally, article 2.3 reminds Member States to take into account socioeconomic characteristics, but these are not referred to, by any means, as the objective of the law.

1.2 Wolf hunting in Sweden

Sweden recently applied its biggest wolf hunt in modern times, with a quota of 75 wolves out of a population of approximately 420[17] which it claimed was legally backed by the Habitats Directive and the caselaw of the European Court of Justice. This has taken place in the midst of a controversy that ranges from the political arena, with an ongoing infringement proceeding of the European Commission, to the scientific field, where disagreements over the conservation status of the wolf persist.[18]

Once extirpated from the Swedish landscape, the wolf recolonized Sweden in the 1980s with 5 initial wolves and a very limited genetic pool. Since then, the species has been growing and repopulating new areas of the country, with scarce presence in the north because of its clash with Indigenous reindeer farming practices, and the vast majority of the population located in central Sweden. Despite the lack of scientific consensus surrounding the conservation status of the Scandinavian wolf, which suffers from inbreeding depression and almost null connectivity with Finnish wolves, the Swedish government decided to grant FCS to the species in the midst of the infringement proceeding with the European Commission, the latter strongly dis-

[16] *Tapiola*, para. 71.

[17] Henrik Andrén and others, 'Beräkningar av beskattning av den Skandinaviska vargpopulationen 2023' *Rapport till Naturvårdsverket, Sverige och Miljødirektoratet, Norge från SKANDULV* (2022) Grimsö forskningsstation, Institutionen för ekologi, Sveriges lantbruksuniversitet (Swedish) 21 (hereafter Skandulv Report).

[18] Linda Laikre and others, 'Planned Cull Endangers Swedish Wolf Population' (2022) 377 Science 162.

agreeing.[19] After over 12 years, with the infringement proceeding still open, Sweden just decided on its 'largest ever cull'[20], with allowable kills far exceeding those which the Commission vehemently opposed back in 2010 and subsequent years, deeming them as 'systemic practice' in breach of the HD.[21]

1.3 EU Legal background

The EU is a member to the Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention)[22], which the Habitats Directive adapts to the specific European context with a stricter, and more effective legal framework.[23] The Habitats Directive establishes a legal framework for the conservation of biodiversity in the European Union, requiring Member States to maintain or reach Favourable Conservation Status for its listed species and habitats and enacting the overall goal of biodiversity conservation.[24] For these ends, the Directive sets a strict protection regime for Annex-IV listed species such as the Swedish wolf, and Annex V lists those species whose exploitation may be subject to management measures, such as hunting regulations. For Annex IV species, article 12 prohibits, amongst other harmful activities, all forms of deliberate capture or killing. However, article 16 permits derogations from this protection scheme when several conditions are met: that there is no other alternative, the derogation is not detrimental to the maintenance or restoration of the species at FCS, and one of the stated purposes listed from letter (a) to (d) are met; or, alternatively, the extra-conditions set in letter (e) are fulfilled: that it is done under strictly supervised conditions, on a selective basis, to a limited extent and concerning certain specimens in limited numbers specified by the competent national authorities. It is under letter (e) that both Finland in the *Tapiola* case, and Sweden in its yearly licensed hunts, frame their tolerance hunting policies.[25]

It is established case law from the CJEU that derogations from strict protection of species listed in Annex IV shall be interpreted restrictively, in order to preserve the exceptional nature of such decisions and not impair the overall objective of the Habitats Directive.[26] This objective is clarified in article 2, which sets an epistemological framework that informs the understanding of the Directive with a set of priorities that should accompany any derogating decision, and whose teleological implications set the framework for this paper. In this sense, article 2.1 states the overall objective of ensuring biodiversity through the conservation of natural habitats and of wild fauna and flora, while article 2.2 mandates measures taken pursuant to this Directive to be designed

[19] I use the verb 'grant' to emphasize the political dimension of decisions involving FCS. *See* Guillaume Chapron, 'Challenge the Abuse of Science in Setting Policy' (2014) 516 Nature 289.

[20] Jon Henley, 'Hunters shoot dead 54 wolves in Sweden's largest ever cull' *The Guardian* (London, 7 Feb. 2023) <https://www.theguardian.com/world/2023/feb/07/swedish-hunters-shoot-dead-54-wolves-in-largest-cull-ever-in-country> accessed 11 May 2023.

[21] Jan Darpö and Yaffa Epstein, 'Thrown to the Wolves–Sweden Once Again Flouts EU Standards on Species Protection and Access to Justice' (2015) 1 Nordisk miljörättslig tidskrift 19.

[22] Convention on the Conservation of European Wildlife and Natural Habitats (Bern Convention) 1979 ETS 104.

[23] Yaffa Epstein, 'The Habitats Directive and Bern Convention: Synergy and Dysfunction in Public International and EU Law' (2014) 26/139 The Georgetown Int'l Envtl. Law Review.

[24] HD (n. 1), art. 2.

[25] Ibid. art. 16.1e) '1. 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): (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'.

[26] *Tapiola*, para. 30.

in order to maintain or restore, at FCS, natural habitats and species of wild fauna and flora of Community interest. Thus, article 2.2 explains *how* article 2.1 is to be operationalized, while article 2.3 states that such measures shall *take into consideration* the economic, social and cultural requirements, as well as the regional and local characteristics. So, first of all, art. 2.1 sets the one objective of this Directive, which develops the Preamble in what can be deemed as an eco-centric approach that recognizes the intrinsic value of nature[27] or, to some, even granting rights to nature from a Hoffeldian approximation[28]. This eco-centric hierarchy is further developed in the following paragraphs of the article, which establish the epistemological framework that encases the interpretation of the whole Directive. Thus, measures shall be *designed to* maintain or restore FCS (art. 2.2), and shall *take into account* socioeconomic circumstances (art. 2.3). Therefore, art. 2.2 and 2.3 describe the *means* to achieve the *ends* of article 2.1, that is, the objective of the Directive.

In line with this epistemological framework, the CJEU has emphasized that article 2.3 does not provide a ground for derogations,[29] but rather requires that measures are not insensitive to the idiosyncrasies of the region, when several options are available none of which jeopardize the objective of the Directive. Moreover, the Court has precluded derogations from taking place on the mere basis of historical or cultural traditions.[30] As the Advocate General in C-247/85 wrote, 'The fundamental purpose of article 2 is to define the general thinking behind the directive, essentially by providing a basis for the various provisions of the directive, in particular (…) the derogations provided for therein'[31].

1.4 The *Tapiola* ruling

Finland allowed hunting for population management purposes (hereinafter licensed hunting), based on article 16.1.e, as Sweden currently does (although selectiveness and limitedness requirements were arguably stricter in the Finnish wolf hunts assessed by the CJEU).[32] Finnish authorities allowed wolf hunts as an 'experiment'[33] to assess if such hunting, added to the protection hunting done on a periodic basis, would lead to increased tolerance and, thus, to a reduction of poaching, which is a big threat for the species in the Nordic countries and is therefore within the prism of article 2.1 HD. Since it is mostly hunters who kill wolves, partly due to their tradition of hunting with loose dogs, the referring court asked if prevention of harm to their dogs could be considered in hunting decisions. Therefore, the referring court wanted to ascertain if the socioeconomic characteristics of a specific hunting practice could justify the modulation of the main objective of protecting biodiversity.

The Court reminded of the importance of article 2.1 in this respect, stating that derogations, when justified under letter (e) for reducing poaching, had to be 'in the interest of protecting

[27] Parikka Altenstedt (n. 6).

[28] Yaffa Epstein and Hendrik Schoukens, 'A Positivist Approach to Rights of Nature in the European Union' (2021) 12 Journal of Human Rights and the Environment 205.

[29] C-371/98 *First Corporate Shipping* [2000] ECR I-09235.

[30] C-182/02 *Ligue pour la protection des oiseaux and Others* [2003] ECR I-12105; C-10-96 *LRBPO and AVES v Région Wallonne* [1996] ECR I-06775.

[31] C-247/85 *Commission v Belgium* [1987] ECR I-03029, Opinion of A Vilaça. While this case involves the Birds Directive, it is applicable to the Habitats Directive because article 2 in both Directives set a similar epistemological framework, and because the CJEU jurisprudence generally applies to both of them.

[32] In the Tapiola case, Finnish authorities had specifically required permit holders to target young specimens or individuals causing nuisance, while in the Swedish hunt entire wolf groups were targeted independently of age or sex.

[33] Yaffa Epstein and Sari Kantinkoski, 'Non-Governmental Enforcement of EU Environmental Law: A Stakeholder Action for Wolf Protection in Finland' (2020) 8 Frontiers in Ecology and Evolution 101.

the species', while strong emphasis was put on the need for rigorous scientific data proving that such hunting would have a net positive effect for the population.[34] This is in line with the epistemological framework of the Directive, whose 'chosen object'[35] is biodiversity and, hence, ecological data enjoys preeminence for its direct relation to the objectives of the law. The Directive also requires that there are no satisfactory alternatives to grant a derogation. Thusly, the Court required authorities to rely on the 'best relevant scientific and technical evidence'[36], and the precautionary principle was erected as a core element of the ruling: in the Court's words, 'if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation will be detrimental to the maintenance or restoration of populations of an endangered species' at FCS, the authorities must not grant the derogation.[37]

The intrinsic value of each specimen is clarified not only in the wording of letter e of article 16, which requires derogations to take place 'on a selective basis and to a limited extent', and for these to concern 'certain specimens (…) in limited numbers specified by the competent national authorities'[38], but also in what the Court made out of this provision in the ruling. The Court developed this provision demanding that such limited number 'does not entail the risk of significant negative impact on the structure of the population in question, even if it is not, in itself, detrimental to the maintenance of the populations of species concerned at a favourable conservation status in their natural range'[39], thus emphasizing the importance of considering the complexity of social animal structures such as those existing in a pack of wolves. Based precisely on the importance of the biological characteristics of each species, the Court established that selectiveness may require for the specimens to be individually identified. Because of this, Finland was deemed to be in breach of the Directive, since several breeding individuals, and 20 alpha males, were killed in the hunts at issue despite official advice to the contrary.[40]

Finally, the referring court also asked at what level to measure FCS when deciding on a derogation. The CJEU answered that FCS had to be measured at all levels, although the local level was arguably the most relevant one to start with, due to the fact that derogations are likely to have a more immediate local impact.[41] Nonetheless, FCS had to be assessed at the other levels as well, including the national, the biogeographical 'if the natural range of the species so requires and, to the extent possible, at a cross-border level'.[42] However, the CJEU reminded that, in doing so, account could not be taken of countries not dutybound 'by an obligation of strict protection of species of interest for the European Union'[43]. This was relevant inasmuch as Finland attempted to include in the assessment of wolves' FCS the Russian populations, which arguably shared a biogeographical region. It is also relevant for the Swedish case, because FCS is, as of today, dependent on a single Norwegian wolf immigrant,[44] a country not dutybound by the HD but by its rather weaker predecessor, the Bern Convention.[45]

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34 *Tapiola*, paras. 45–46.
35 Text to n. 15.
36 *Tapiola*, para. 51.
37 Ibid., para. 66.
38 HD art. 16.1(e).
39 *Tapiola*, para. 72.
40 Ibid., para. 78.
41 *Tapiola*, para. 59.
42 Ibid., para. 61.
43 Ibid., para. 60.
44 Administrative Court in Luleå, judgment 2022-11-30, Case No 1843-22 (Swedish) 2 (hereafter C-1843-22).
45 Arie Trouwborst, Floor M Fleurke and John DC Linnell, 'Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd"'

2. Swedish legal framework and 2023 license hunt

Sweden applies, in practice, two regimes with regards to wolf hunting: one to protect livestock and other types of property, known as protection hunting, on the basis of article 16.1(b) HD and transposed into national legislation in section 23a and 23b of the Hunting Regulation (1987:905); and the one that concerns this paper, that is, licensed hunting, intended to reduce the density of the populations of the species concerned, based on article 16.1(e) HD, and transposed in section 23c of the Hunting Regulation. Indeed, the wolf is regulated as a game species and therefore is, by definition, excluded from environmental regulations or environmental courts through section 4 of the Swedish Species Protection Regulation (2007:845), the Regulation that is supposedly implementing the Habitats Directive with regards to species protection. This entails that article 2 HD is not transposed for the wolf in national legislation.

According to the Swedish predator policy, regionalized decision making increases legitimacy amongst the local populations, and thus, the Swedish Environmental Agency (SEPA) delegates the possibility to decide on license hunting to the County Administrative Boards (CABs) whenever the wolf population is above its chosen reference value, currently set at 300 individuals.[46] Although a delegation to decide on license hunting should not imply necessarily that CABs do allow hunting, this has been standard procedure for years.

The 2023 hunt originates in the Riksdag's decision, on May 18th 2022, to lower the wolf population to half its size.[47] The specific demands revolved around its decided favourable reference value, which, according to the Riksdag, needed to be lowered from 300 individuals to 170–270 individuals, keeping the population closer to the bottom level. However, this is a political decision that does not necessarily have to correspond to the legal reality of a Member State in the EU. Thus, SEPA had to justify somehow these population reductions according to EU law.

Some notes on the choice of the specific number of 170 individuals can bring some light to the issue at hand: the range of 170–270 wolves as the margin for FCS was the result of a study where a researcher was asked to calculate how many wolves would suffice in Sweden, back in 2013, for the species to be under a 10% probability of going extinct in the next 100 years, if the species had good genetic status.[48] As follows, genetic and ecological aspects legally mandated by the Directive were not present in this study.[49] From the study's results, which gave a rough number of 100 wolves, and since there was not good genetic status, the government chose the FCS level at 270 plus 2.5 immigrant wolves per generation.[50] This led the main researcher commissioned for the study to complain publicly about the manipulation of his results, since his study was based on 'a demographic measure of how close the population is to extinction, and crucially, is a separate measure from FCS, which

(2017) 20 Journal of International Wildlife Law & Policy 155.

[46] Naturvårdsverket 2015, 'Delredovisning av regeringsuppdraget att utreda gynnsam bevarandestatus för varg' (2015) M2015/1573/Nm (Swedish) 7 (hereafter SEPA Report).

[47] Sveriges riksdag, 'Naturvård och biologisk mångfald' (18 May 2022). <https://www.riksdagen.se/sv/dokument-lagar/arende/betankande/naturvard-och-biologisk- mangfald_H901MJU24> accessed 1 January 2024.

[48] Yaffa Epstein, 'Favourable Conservation Status for Species: Examining the Habitats Directive's Key Concept through a Case Study of the Swedish Wolf' (2016) 28/2 Journal of Environmental Law p. 231, <https://academic.oup.com/jel/article/28/2/221/2404189> accessed 1 January 2024.

[49] Ibid.

[50] Ibid., 231.

relates to recovery'.[51] The European Commission, in a second reasoned opinion on June 2015, pointed out the low numbers of wolves, the poor genetic health of the population and the lack of sufficient connectivity with neighbouring countries.[52] Thusly, the government tasked SEPA with running a new study on wolves' FCS in 2015.[53]

The researchers of this new study, who, this time, were asked how many wolves were necessary in Sweden to have FCS according to the Directive, were everything but unanimous, and SEPA had to choose some researchers' findings over others. Interestingly, the chosen option belonged to the subset of researchers who chose the lowest number (300 individuals plus consistent influx of immigrants to reduce inbreeding), justifying these on the necessity to disregard pure scientific results, in order to include the sociopolitical controversy in their final decision.[54] This shall contrast with how FCS is calculated in other Member States: In Spain, for example, the wolf is considered at an unfavourable conservation status despite censuses estimating a population of 2128 individuals, approximately.[55]

The new decision from the Riksdag, therefore, meant that SEPA would have to justify a political decision taken for the sake of the hunting and farming industry, and frame it inside the boundaries of the Habitats Directive's requirements on FCS, even though it was precisely the lack of consistency of this 2013 FCS decision that prompted SEPA to commission a new study on the subject. In the end, SEPA did not change the chosen reference value for wolves, but, when the hunting season arrived, CABs were allowed to establish a total quota of 75 wolves to kill through the 2023 license hunt, far exceeding the numbers of any previous wolf hunt in the country in modern times, to be added to the regular protection hunts and the estimates of cryptic poaching[56]. As examples of reasons to decide on a hunt by the CABs, SEPA exemplified the contribution to the reduction of illegal hunting, the reduction of the socio-economic and psychosocial impact that dense wolf packs can have on people living in areas with a lot of wolves, and the non-supported claim that license hunting can reduce the inbreeding coefficient.[57] Nevertheless, it has been mostly the reduction of socioeconomic consequences consisting of attacks to livestock that CABs have used to justify their hunts.[58] These reasons will be set against the backdrop of the Tapiola ruling in section 3.

2.1 Deficient transposition

Since wolves are subject to the hunting legislation, cases regarding this EU strictly protected species are not judged by Swedish Environmental Courts, but neither they are by regular Administrative Courts in their territorial adscrip-

[51] Guillaume Chapron 'Challenge the Abuse of Science in Setting Policy' (2014) 516 Nature 289.

[52] Epstein (n. 48) 224.

[53] SEPA Report (n. 46). *See* Jan Darpö, 'The Commission: a sheep in wolf's clothing?' (2016) 13/3-4 Journal for European Environmental & Planning Law, to know more about the infringement proceeding against Sweden.

[54] Liberg and others, 'An Updated Synthesis on Appropriate Science-Based Criteria for "Favourable Reference Population" of the Scandinavian Wolf (Canis lupus) Population' *Assignment from SEPA* (2015) Sveriges lantbruksuniversitet, 8,47.

[55] LCIE Assessment (n. 11).

[56] Cryptic poaching is the one that remains undetected by conventional methods, which accounts for more than two thirds of total poaching according to Olof Liberg and others, 'Shoot, shovel and shut up: cryptic poaching slows restoration of a large carnivore in Europe' (2012) 279/1730 Proceedings of the Royal Society B <https://royalsocietypublishing.org/doi/10.1098/rspb.2011.1275> accessed January 1 2024.

[57] Naturvårdsverket, 'Naturvårdsverket vägledning i samband med att möjligheten att fatta beslut om licensjakt på varg 2023 överlåts till länsstyrelserna' Bilaga 1, NV-05826-22, 2022 (Swedish) 5 (hereafter SEPA Appendix I). My trans.

[58] Länsstyrelsen Dalarnas Län Case No. 218-13046-2022 (Swedish) 11.

tion. This is because, after several wolf hunts were overturned by some administrative courts, a political decision was taken to move all cases regarding wolf hunting directly to the Administrative Court of Luleå, which was preferred by certain stakeholders and happened to have the highest record of pro-hunting rulings.[59]

The most relevant element to consider here is the lack of a full transposition of the Directive for the wolf: if the Directive requires that measures are designed to reach FCS, and that socio-economic consequences are taken into consideration, but not established as the one objective, how can Swedish license hunting be aimed at reducing the population in order to consider socio-economic consequences, as it is repeatedly said in CABs' decisions? The explanation, though, is quite straightforward: article 2 HD is nowhere transposed into the Hunting Act nor Hunting Regulation, since these are aimed at regulating a traditional activity consisting of the sustainable exploitation of a game species for the benefit of those who practice it, and thus do not participate of the eco-centric view entrenched in the Directive. Article 2 of the Directive considers the intrinsic value of specimens of protected species by and of themselves, and places biodiversity conservation beyond mere economic or recreational sectoral interests. Therefore, when license hunting decisions state that hunts should be based on the *corresponding provisions* of the Habitats Directive,[60] they are actually just talking about article 16 HD without its original legal context (article 2), because it is the only provision of the Directive that has been transposed in the Hunting Regulation.

2.2 Breach of legal precedent

The inclusion of the wolf as a game species may be in defiance of a CJEU ruling that explicitly prohibited strictly protected species from being regulated in game management regulations, since strict protection is precisely aimed at protecting these from hunting, among other human activities.[61] Although this ruling involved the Birds Directive[62], the reasoning can be extrapolated to the Swedish wolf situation, since decisions interpreting the Birds Directive can often be applied to the HD and vice versa. This case was similar to the one at hand: the Belgian government included a strictly protected bird species inside its hunting regulation, and it argued that, since hunting the species was nevertheless dependent on specific administrative decisions, the abstract inclusion of a species as game did not imply a breach of the legal protection per se. However, the mere fact that, formally, it was not included in species protection regulations but in hunting regulations, was already considered a breach of EU law by the CJEU.[63] As the Advocate General put it,

> [A]chievement of the objective pursued by the directive, namely conservation of the species in question by protecting them *from* hunters, is not effectively guaranteed by the relevant provision (…), notwithstanding the fact that it does not grant express authorization to hunt but – in formal terms – merely treats those species as game.[64]

In contrast, Swedish authorities openly admit their intention of treating the wolf as game, referring to the LCIE guidance on the matter:

[59] Gustav Stenseke, 'Entangled Law' Dissertation, Karlstad University 2021, 282–83.

[60] Länsstyrelsen Värmland Case No. 218-7033-2022 (Swedish) 10. My trans.

[61] C-247/85 (n. 31).

[62] 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.

[63] C-247/85.

[64] Ibid., 3043-3044 (emphasis added).

> [F]rom a conservation point of view, there is no principled reason why the populations of large carnivores cannot tolerate certain levels of hunting management measures or to be managed under the same conditions as huntable ungulates or huntable bird species. (…) Article 16 provides, in summary, an opportunity to allow hunting, and the retention of traditional hunting methods.[65]

The CJEU ruling was aimed precisely at preserving the core epistemological framework of the Directive when transposed into national legislation, which is why it emphasizes the importance of the objective, i.e. the protection of the species. Indeed, and going back to the Swedish wolf case, article 16 should be read in relation to article 12's prohibitions, which emanate from the whole body of environmental law that holds at its core the principles of article 2 of the Directive. Instead, article 16 is transplanted inside a preexistent legal regime with a different epistemological framework. In this way, EU law is trickled down and diluted in hunting regulations that hold diverging objectives from those of species protection. Therefore, no valid transposition of the Directive can take place when the whole epistemological framework of the law is reversed for the sake of previous ontologies constructed on contradictory premises.

3. *Tapiola* requirements compared to Swedish official guidelines and decisions for the 2023 hunt

In June 2023, SEPA decided, as in previous years, to delegate the decision on wolf license hunting to the CABs in the Central Predator Management Area, to reduce the population density where it is greatest. To address the Riksdag's decision of dubious compliance with EU law, SEPA allowed bigger hunting withdrawals on the following basis:

> Considering the development of the wolf population and the possibility of, through special conditions, both aiming the hunt towards completely emptying territories and excluding territories with genetically important wolves, the Swedish Environmental Protection Agency assesses that larger extractions than before are possible without having a significant negative impact on the tribe's structure.[66]

Thus, the CABs of Gävleborg, Dalarna, Västmanland, Örebro and Värmland, all belonging to the Central Predator Management Area, decided on wolf hunting. Some representative decisions on license hunting are analyzed below against the backdrop of the *Tapiola* ruling.

3.1 Weight of article 2.3 and standard of proof

As the *Tapiola* decision clarified, Finland could not derogate under article 16.1.e HD when the objective of such derogation was not aimed at protecting the species, in that case, from poaching (art. 2.1 vs. 2.3).[67] Therefore, the premises claimed by the management agency of preventing harm to dogs and increasing the feeling of safety among the local inhabitants, could not be in themselves reason enough to derogate under article 16.1.e HD. The objective of the derogation had to be aimed at article 2.1 and 2.2 HD, and the means of reaching that objective, in this case, were identical to those of article 2.3. Thus, article 2.3 was, in the Finnish case, as in the Swedish one, the *means* to reach the *ends* of article 2.1/2. This ruling influenced the legal justifications of Swedish wolf licensed hunting, which, before the *Tapiola* case, justified derogations directly

[65] Länsstyrelsen Värmland Case No. 218-7033-2022 (Swedish) 11. My trans.

[66] SEPA Appendix I (n. 57) 8. My trans.

[67] *Tapiola*, para. 42–43.

under article 2.3 (to take into account socioeconomic circumstances), while now they claim to be using article 2.3 to achieve the objective of 2.1/2 (to conserve the wolf species by maintaining FCS), although key research proving such nexus has been rather scarce.[68]

Specifically, the Court required supporting evidence in the form of:

> rigorous scientific data including, where appropriate, comparative data on the effects of hunting for population management purposes on the conservation status of wolves, so that it can be proved that licensed hunting is capable of reducing illegal hunting to such an extent that it would have a net positive effect on the conservation status of the wolf population, whilst taking into account of the number of derogation permits envisaged and the most recent estimates of the number of wolves taken illegally.[69]

The importance of orientating the derogation towards the goal of protecting the species was further emphasized when the Court stated that, to assess the legality of the policy, the referring court would have to '*definitively* establish (…) the ability of the derogation permits issued for hunting for population management purposes to attain their objective of combating poaching *in the interest of protecting the species*'[70]. It is notable the insistence given by the Court to the strict need for more than mere research pointing to a theory, and to the importance of such derogations being aimed at article 2.1 and not at 2.3, as was referred by the national court when asking for the weight that could be given to the tradition of hunting with loose dogs in wolf hunting decisions.

In contrast, all the decisions issued by CABs constantly emphasize that the aim of these hunts is to reduce socioeconomic consequences. To illustrate this weight of the means over the ends, let it suffice to mention the formula that is repeated in all the decisions with very small variations: when discussing the absence of alternatives, they all conclude that 'in order to reduce the socio-economic impact, the impact on moose management and to facilitate the keeping of domestic animals, there is no other suitable solution than license hunting, which aims to reduce the concentration of wolves in the areas where they are most dense'.[71]

It is worth noting how most of these reasons actually belong to letter (b) of article 16, instead of letter (e). In fact, and contrary to CJEU advice,[72] license hunting is seen as a complement to overcome the limitations imposed by letter b), which may require that one tries to target the wolf responsible for the livestock attack. The fact that both protective hunting and licensed hunting aim at protecting private property is conspicuous in the decision of Dalarna and Gävleborg, when discussing the insufficiency of protective fences and other non-lethal ways to protect livestock, which is literally the content of letter (b):

> [W]ith an increased wolf population, the risk of damage and negative socio-economic consequences also increases. Without license hunting, the wolf population will grow in size, which in the long run will lead to an increased need for protective hunting as the risk of injury will increase.(…) An alternative to license hunting for wolves, to prevent damage, is protective hunting. However, the county administrative board makes the assessment that, based on its current crite-

[68] Stenseke (n. 59) 288–9.
[69] *Tapiola*, para. 44.
[70] Ibid., 46 (emphasis added).
[71] Länsstyrelsen Dalarnas Län Case No 218-13073-2022 (Swedish) 27. My trans.
[72] *Tapiola*, para. 36.

> ria structure, protective hunting should be used as a complement, not an alternative, to license hunting. (…) Unlike license hunting, the purpose of protective hunting must not be to regulate a population.[73]

Even if CABs referred exclusively to the purpose of reducing poaching with a net overall effect as the reason to apply licensed hunting, rigorous scientific data on the strict terms expressed by the CJEU would still be needed. However, even the main CABs admit that there is no conclusive evidence of such link between license hunting and an increase in tolerance that ultimately leads to a reduction in poaching rates.[74] What has been done instead, is a sort of conceptual *salami slicing*, in reference to the environmental impact assessment practice, but with the main objective and its subordinate premises. The premises that sustain the theory of tolerance hunting are twofold: on one hand, that weak trust in game management can lead to poaching, and on the other, that license hunting can increase trust in management. The CABs have only been able to rely on research pointing to the first premise, but they themselves admit that recent studies prove that trust in management does not increase because a license hunt has taken place, so the second subordinate premise is lacking at the moment. According to the CABs: 'New research (…) does not support that changes in people's attitudes towards predator management can be seen in the short term solely thanks to the opportunity to hunt wolves (Dressel, S. et al. 2021)'.[75] Then, in a clear defiance of the precautionary principle, all CABs go on to say that these hunts should be repeated in order to gain more knowledge on how these can help increase trust in management: 'The new knowledge needs to be repeated over time in order to get a clearer picture of what a license hunt for wolves can contribute and how a shift in attitude towards tolerance and trust in the administration can be made possible'.[76]

Therefore, the main objective of the license hunts appears confusing. While CABs keep mentioning that license hunting to account for socioeconomic aspects can help reducing poaching, the latter ends up being a mere complement, letting the real objective of the hunt resurface: 'Reducing the concentration of the wolves in the area aims to reduce the socio-economic consequences for accommodation, facilitate the keeping of domestic animals and, *if possible*, increase trust in the Swedish predator management'[77]. Thus, increased trust – not even the direct reduction of poaching- is seen as a complement to the assured objectives of protecting private property in some parts of the decisions. The fact that the real objective of the hunt is so elusive, changing during the decisions depending on what is being justified (in the lack of satisfactory alternatives section, for example, it gives the impression that it is article 16.1(b) they are talking about), complicates the legal analysis even more.

This is very far away from the required scientific evidence required by the *Tapiola* case, which would require not only that the first two premises were actually proven with rigorous scientific evidence beyond reasonable doubt as mandated by the precautionary principle, but that the main element under discussion was also proven under equal terms. But, by spending entire decisions focusing on the links between these two premises, that is, that low trust in management can lead to poaching and that license

[73] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 25. My trans.
[74] Länsstyrelsen Värmland Case No. 218-7034-2022 (Swedish) 26.
[75] Ibid. My trans.
[76] Ibid. My trans.
[77] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 10 (emphasis added). My trans.

hunting can increase trust in management, they elude the core element on whose basis tolerance hunting is justified: whether or not it can actually lead to a significant reduction of poaching with a net positive effect. This in itself is also in breach of the *Tapiola* case, because 'a derogation decision must define the objectives relied upon in support of a derogation *in a clear and precise manner* and with supporting evidence'[78], and

> [T]he objective of a derogation based on Article 16(1)(e) of the Habitats Directive cannot, in principle, be confused with the objectives of the derogations based on Article 16(1) (a) to (d) of that directive, with the result that the former provision can only serve as a basis for the grant of a derogation in cases where the latter provisions are not relevant.[79]

3.2 Other satisfactory alternative

In order to discard other satisfactory alternatives, the *Tapiola* case required national authorities to consider the 'best relevant scientific and technical evidence and in the light of the circumstances of the specific situation in question'[80]. The addition of the superlative *best* is, again, a reminder of the insufficiency of mere theories endorsed by academics, as long as these are not the *best* or are not *relevant*[81]. The requirements are, therefore, quite high for authorities to implement these policies, precisely to avoid derogations becoming grounds for experimental trials involving the killing of protected species. Indeed, the Court was quick to remind that problems with monitoring criminal activities such as poaching are not derogation grounds, since in a situation such as this, enforcing measures would have to be adopted.[82] In contrast, CAB decisions argue about the difficulty and resource-intensiveness of supervising and investigating illegal hunting, pointing instead to license hunting as a better alternative to reduce tolerance for poaching, despite the lack of sufficient scientific evidence.[83]

In line with the salami slicing analogy, no alternative solution is proposed with regards to reducing poaching because this is not even seen as the main objective in this part of the decisions, again in breach of the requirement to establish clear and precise objectives.[84] Indeed, the means to reach the ends, that is, the socioeconomic consequences that are to be eased in order to attain the objective of reducing poaching, are made an end in themselves, and so alternative measures are not assessed in relation to the objective pursued, as mandated by the CJEU, but in relation to the means to attain those ends. This is quite obvious in the statement 'there is no other suitable solution than licensed hunting to reduce the density of the wolf population'.[85] In fact, not only is the reduction of poaching completely disregarded in the assessment of alternatives, but, bordering on the absurd, the erasure of entire wolf territories is erected as the main objective, and so all decisions justify how the transportation or the sterilization of these 75 individuals would be too costly and unfeasible.[86]

As was previously mentioned, all measures considered when assessing possible alternatives revolve around predator-proof fences, protection hunting and compensation for injuries. When alternatives based on prevention are assessed, one

[78] *Tapiola*, para. 41, emphasis added.
[79] Ibid., para. 37.
[80] Ibid., para. 51.
[81] Ibid., para. 50 'relevant technical, legal and scientific reports'.
[82] Ibid., para. 48.
[83] Work with the Bergslagen police is mentioned, though, in Länsstyrelsen Dalarnas Län Case No. 218-13046-2022 (Swedish) 15.
[84] *Tapiola*, para. 41.
[85] Case 1843-22 (n. 44) 11. My trans.
[86] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 26.

would expect it is prevention of poaching they refer to, yet it is prevention of damage to livestock they actually address.[87] Moreover, even if these were valid reasons under article 16.1.e, one should ask why are predator repellent measures, such as electric grids, discarded over licensed hunting on the sole grounds of its lack of complete effectiveness. If there is one thing that the decisions make clear along their justifications, is the lack of certainty of license hunting as a measure to reduce poaching, yet they claim it is worth trying in the name of adaptive management.[88] The fact that, in front of two uncertain alternative measures, uncertainty is bent in favour of killing a protected species, means in itself that there has been a reversal of the precautionary principle, of the hierarchy of article 2 and of the burden of proof.

Moreover, all decisions make it clear that no tradition will be adapted to the reality of this protected species. In this sense, the repeated formula 'Meaningful hunting should be able to be conducted even in areas with wolves, with regard to the risk of attacks on dogs and possible hunting withdrawals' is inserted in all hunting decisions,[89] which is the evermore grim if we consider the fact that there are practically no protected areas for wolves in Sweden, despite the obligations contracted under Annex II of the Directive.[90] Besides, the CJEU has ruled with regards to the clash between traditions and species protection in the past, placing the reasoning inside the epistemological framework of article 2 HD and thus prioritizing species protection. This can be seen in the Advocate General's opinion in C-10/96:

> It is in the nature of environmental protection that certain categories of persons may be required to amend their behaviour in pursuit of a general good (…). That such activities may be 'ancestral' or partake of an 'historical and cultural tradition' does not suffice to justify a derogation from the Directive.[91]

It is therefore questionable whether there is a lack of satisfactory alternatives, or rather a lack of sociopolitical will to adapt to changing times.[92]

3.3 Precautionary principle

The precautionary principle, already ingrained in art. 191(2) TFEU[93], was operationalized by the CJEU in a novel, stricter way, since

> For the first time, the Court went beyond a strict anthropocentric view (…) by recognizing the relevance of conservation measures for the non-human animals (…), applying the precautionary principle in the light of the scope of the Habitats Directive, which is to protect the natural heritage of the Union.[94]

Indeed, the strong interpretation of this principle has been distinguished by de Vido as an example of how the articulation of the principle of reasonableness can help to overcome epistemo-

[87] Ibid.
[88] Länsstyrelsen Värmland Case No. 218-7035-2022 (Swedish) 23.
[89] Ibid., 18. My trans.
[90] Parikka Altenstedt (n. 6) 103.
[91] C-10-96 *LRBPO and AVES v Région Wallonne* [1996] ECR I-06775, Opinion of AG Fennelly.
[92] For in-depth analysis of existing alternatives measures, *See* Van Eeden LM, Eklund A, Miller JRB, López-Bao JV, Chapron G, Cejtin MR, et al. (2018) Carnivore conservation needs evidence-based livestock protection. PLoS Biol 16(9): e2005577. <https://doi.org/10.1371/journal.pbio.2005577> accessed 1 January 2024.
[93] Consolidated version of the Treaty on the Functioning of the European Union (26 October 2012) OJ L32647.
[94] Sara de Vido, 'Science, Precautionary Principle and the Law in Two Recent Judgments of the Court of Justice of the European Union on Glyphosate and Hunting Management' (2020) 43/2 DPCE Online <https://www.dpceonline.it/index.php/dpceonline/article/view/964> accessed 1 January 2024, 1338.

logical challenges attached to the scientific uncertainty inherent to the precautionary principle. However, the importance of the ruling extends not only to its operationalization of legal precaution, but 'because it shows an unprecedented eco-centric move that leaves hope for the future jurisprudence of the Court on the conservation and preservation of non-human animals'.[95]

Certainly, the Court's interpretation of this key principle of environmental law narrowed the margins of available management options for national authorities. Even if this seems a rather strict interpretation of the precautionary principle, this goes in line with two elements of the Directive: first, that the burden of proof is always on the derogating authority,[96] and second, that article 2 already sets the elements that will be prioritized in case there lacks certainty. Therefore, if uncertainty was bent in favor of article 2.3, or derogating decisions were given a presumption of validity in the Court, this would entail a contradiction of the inner logic of the Directive. This explains why, in the light of the conflicting evidence put forward by the parties, the CJEU decided that the nexus between preventing harm to dogs and increasing the feeling of safety with the reduction of poaching was surrounded by uncertainty and was therefore not admissible.[97] Moreover, this strong epistemic standard of proof is justified by the existence of several other grounds for derogation in article 16, which include those of preventing serious damage to property, or in the interests of public health, public safety and other imperative reasons of overriding public interest, including socioeconomic ones. Thus, since article 16 already establishes multiple situations in which derogations may take place, it makes sense that the Court refined letter (e) so that it would not become a way to circumvent strict protection.

Two elements in the *Tapiola* case must be noted for its resemblance with the Swedish wolf hunt of 2023: one, that Finland referred to these license hunts as an 'experiment'[98] to see if these would help reduce poaching, while CABs admit in their decisions that knowledge proving the utility of licensed hunts to reduce poaching is lacking and, therefore, these should take place to gain such knowledge. Basically, it is equally an experiment. In the *Tapiola* case, this made the CJEU consider that the hunt did not comply with the precautionary principle. On the other hand, the fact that the Finnish wolf hunt concerned 15% of the population was also considered incompatible with the Directive, and was rejected by the CJEU.[99] However, in the 2023 Swedish hunt, the percentage is even higher, of almost 17% of the total wolf population. While the taxation commissioned by SEPA has been able to calculate the risk assumed by the authorities when deciding on this hunt (13% risk of falling below FCS)[100], no assessment of the possible net effect of this hunt on poaching has been developed, which is precisely what the CJEU attempted to do when it said that

> [T]he management plan estimated the annual number of wolves killed illegally at approximately 30 specimens. Further, Tapiola and the Commission claim that hunting for population management purposes led to the killing of 13 or 14 additional specimens as compared with those which, according to the estimates, would have been killed as

[95] Ibid., 1343.
[96] *Tapiola*, para. 30.
[97] *Tapiola*, para. 44.
[98] Epstein and Kantinkoski (n. 33) 7.
[99] *Tapiola*, paras. 63–65.
[100] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 20.

> a result of poaching, thus resulting in a net negative effect on that population.[101]

However, the precautionary principle, while being mentioned in the decisions, seems to have been substituted, in practice, by the principles of adaptive game management. These are mentioned by CABs as the explanation for the lack of certainty, since 'this is accepted methodology in all wildlife management'.[102] In fact, Finnish courts ruled in favor of wolf hunting, based precisely on the precautionary principle, arguing that precaution meant not to stop a measure that might help to reduce poaching.[103] Although this was obviously corrected by the CJEU, it is noteworthy that CABs in Sweden are doing exactly the same, admitting that they do not have the scientific basis and using that absence as grounds to kill a protected species.[104] The argument could be summarized as follows: 'the precautionary principle dictates that, based on scientific knowledge, we should kill wolves to save the species. However, we need to kill them first to gain that scientific basis'.

3.4 Limitedness and selectiveness of the derogation

While the CJEU ruled that derogations must be so limited that, even if they do not affect FCS, these must not negatively impact the structure of the population, and that selectiveness might require in some circumstances to individually target the specimens,[105] the Swedish license hunt is mandating that all individuals in the decided wolf territories 'be killed regardless of the animal's sex and age'[106]. The Court divided the requirements of article 16.1.e, in this respect, in (i) limited and specified numbers, and in (ii) the selective and limited extent of the derogations.[107] However, in practice these two requirements can overlap in the analysis, which is why they are put together under the same subheading. Again, the Court's emphasis was located on the need to determine the number of specimens targeted by the derogation through rigorous scientific data, relating to geographic, climatic, environmental and biological factors. Indeed, no reference is made to socioeconomic elements in this respect. Moreover, the fact that such number shall not negatively impact the structure of the population, even if it does not affect the conservation status, has deep implications for wolf hunting. Since wolves are extremely complex social animals, the dynamics in a pack and of the ones nearby, who demarcate their territories in reference to the existence of other groups, are seldomly not affected by a hunt that targets them. What is definitely obvious, is that the structure of the population is altered when entire wolf packs are killed, which is what Swedish CABs are establishing in their decisions.

Regarding the requirement of derogations having a selective and limited extent, these shall cover a 'number of specimens determined in the narrowest, most specific and efficient way possible, *taking into account the objective pursued by the derogation*'[108]. This might not be applicable under the same terms to the Swedish case, inasmuch as the objective pursued by the derogation is to directly kill entire wolf territories, while the Finnish case explicitly required the avoidance of breeding pairs and alpha males when killing the

[101] *Tapiola*, para 64.
[102] Länsstyrelsen Örebro län Case No. 218-8466-2022, 20. My trans.
[103] Epstein and Kantinkoski (n. 33).
[104] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 22.
[105] *Tapiola*, para. 73.
[106] Länsstyrelsen Dalarnas Län Case No. 218-13073-2022 (Swedish) 2. My trans.
[107] *Tapiola*, para. 70.
[108] Ibid., para. 73 (emphasis added).

wolves.[109] However, the Court established that, in view of the biological characteristics (and it did not mention for this purpose the relevance of the objective of the hunt, or of socioeconomic factors), it may be necessary to target individually the identified specimens. Indeed, the need to preserve the structure of the population is hardly compatible with the killing of breeding pairs or alpha males, whose killing led the Court to decide on the lack of limitedness and selectiveness of the derogations, not merely because of the breach of national guidelines in this respect, but because breeding pairs are 'particularly important for the objectives of the Directive', the Court referring to article 2's hierarchy in this respect.[110] Moreover, the killing of 20 alpha males allowed 'doubt to be cast on the selective nature of the derogation permits granted (…) and the limited nature of the taking of animals'.[111] Thus, it is only the breach of the strictly controlled conditions in the *Tapiola* case that would not be applicable in the Swedish hunt, since the strictly controlled conditions and effectiveness of the latter's monitoring did not require at any moment to protect breeding pairs or alpha males.

In the Swedish wolf hunt, there are only two limitations: geographical and genetic. However, the genetic one might not be fulfilled since only immigrants and their first-generation offspring are protected by this categorization (F1), despite CABs decisions admitting that second-generation offspring (F2) can also improve the inbreeding coefficient.[112] Since one of the reasons stated for this hunt is that it might reduce inbreeding, one wonders how is this going to be the case if F2s are killed, and immigrants are only protected for one generation more before these can be killed as well. This is even more problematic if we consider that the inbreeding coefficient of the Scandinavian wolf is extremely high (0.23), reaching the level of siblings.[113] The fact that some counties were barely beyond their minimum levels also draws attention to this *de minimis* policy: Dalarna county, for example, decided on a hunt despite there being only 8.75 wolf litters, which is essentially the established minimum level (8 litters).[114] The violation of article 2 is very clear in what Swedish authorities make of the ruling's requirement on limited and specified numbers, since the CJEU required that these numbers are in accordance with the biological characteristics of the species. Meanwhile, hunting decisions state that, based again on an extract from the LCIE, 'wolves live in family groups in territories that they claim against other wolves. In order to reduce the density of wolves, one therefore needs to reduce the density of wolf territories'[115]. So, truth be told, Swedish authorities pay attention to the biological characteristics of the wolf when deciding on its hunting. However, the goal pursued when considering the biological characteristics of the species does not seem to be its protection, but rather its reduction.

3.5 Favourable Conservation Status

The relevance of the Court's clarification of how FCS is to be accounted at all levels cannot be overestimated, since this debate has been ongoing for decades and some countries prioritize some levels over others in order to justify FCS when it might not be reached at all relevant levels. For example, while Sweden has considered for long that FCS is to be measured at a cross-county level, including countries with whom there is not even a shared natural range, such as

[109] Ibid., para. 78.
[110] Ibid., paras. 77 and 25.
[111] Ibid., para. 78.
[112] Länsstyrelsen Värmland Case No. 218-7033-2022 (Swedish) 18.
[113] Ibid.
[114] Länsstyrelsen Dalarnas Län Case No. 218-13046-2022 (Swedish) 21.
[115] Ibid., 15. My trans.

Poland and other Baltic states,[116] in other countries, such as Spain, regional authorities have argued in the courts for FCS to be evaluated at the regional level, so that, even if the population is at an unfavourable conservation status in the whole country, it might have FCS at the level of a specific region. With this ruling, less room is left for authorities' discretion when interpreting FCS, who now must account for all relevant levels instead of prioritizing one over others.

For the Swedish case, it is mainly the exclusion of non-EU countries (or, more specifically, countries not dutybound by an obligation of strict protection such as the one in the Habitats Directive), that is relevant for this analysis. Despite clear interpretation from the CJEU, the decision of FCS for the Swedish 2023 hunt relies on the sole wolf immigrant living in Norway.[117] Without this individual, SEPA would not even be able to meet the requirement of 300 individuals plus 1 immigrant per wolf generation from the report that the Agency chose over the other results, back in 2015.[118] Thus, according to this same study that Swedish authorities apply, there would need to be 1700 wolves in Sweden to have FCS at the moment.[119]

On the other hand, the impact of the Swedish hunt in local territories is quite self-evident inasmuch as it is mandated that entire wolf groups (and therefore, wolf territories) are erased, which raises questions as to how is local FCS level really accounted for. Moreover, not only did the CJEU require FCS to be primarily focused at the local level,[120] but it did require for derogations, in order to meet the requirement of ensuring FCS, to be 'based on criteria defined in such a manner as to ensure the long-term preservation of the dynamics and social stability of the species in question'.[121] Once again, no long-term dynamics nor social stability of a local population is left when entire wolf groups are killed. How this decrease in the population can amount to a net positive effect is, indeed, counterintuitive. Moreover, certain hunts were aimed at dissolving territories shared with Norway. For example, in the Värmland CAB, in the border with Norway, the hunting decisions stated that 'the conditions for license hunting in the border areas are analyzed based on the same criteria as other areas, wolf management near the Norwegian border can take place on the same terms as in other parts of Sweden'.[122] This assessment was maintained by Swedish courts, even when the Court in Oslo temporarily inhibited this same hunt on its side of the border.[123] Again, this hardly seems compatible with the CJEU statement on third countries.[124]

4. Swedish case law under the lens of the *Tapiola* ruling

Three court rulings addressing the legality of 2023's wolf license hunt are analyzed here, case number C-1827-22, C-1843-22, and C-2166-22.[125] These correspond to the CABs of Värmland (C-1827-22 and C-2166-22) and Örebro (C-1843-22) counties. However, instead of analyzing each ruling separately, the three of them are put together and divided into the previous categories of chapter 2 with regards to the *Tapiola* elements,

116 SEPA Report (n. 46) 7.
117 Case 1843-22 (n. 44) 2.
118 Text to n. 54.
119 Liberg and others (2015) (n. 54) 8.
120 *Tapiola*, para. 59.
121 *Tapiola*, para. 57.
122 Länsstyrelsen Värmland Case No. 218-7033-2022 (Swedish) 9. My trans.
123 Administrative Court in Luleå, judgment 2022-12-28, Case No. 2166-22 (Swedish) 7 (hereafter C-2166-22).
124 *Tapiola*, para. 60.
125 Administrative Court in Luleå, judgment 2022-11-30, Case No. 1827-22 (Swedish) (hereafter C-1827-22); Administrative Court in Luleå, judgment 2022-11-30, Case No. 1843-22 (Swedish); Administrative Court in Luleå, judgment 2022-12-28 Case No. 2166-22 (Swedish).

in order to facilitate the analysis of relevant EU law aspects. The only elements whose order has been altered correspond to limitedness, which is addressed together with FCS due to the different Luleå Court's analysis. All the requests for preliminary rulings were rejected, and so were the petitioned preliminary injunctions. In all cases, the hunt was considered valid, although with some changes in the selectivity requirements in case number C-1827-22 and in the demarcation area in case number C-2166-22.

4.1 Weight of article 2.3 and standard of proof

Although the Administrative Court of Luleå did mention, in all rulings, the *Tapiola* case with regards to the need of a purpose, and the necessity of a link between this objective and the means to attain it, all rulings left out the part where the CJEU required the objective to be aimed at article 2 HD. Moreover, only in case C-2166-22 it is mentioned that the fight against poaching is a valid reason to derogate according to *Tapiola*.[126] Regarding the needed scientific evidence, which must prove that poaching is reduced with a net positive effect, the only research they mention is that of P. Kaltenborn and M. Brainerd, that is, a paper that assesses the possibility of license hunting in Norway increasing acceptance.[127] However, this paper does not establish any conclusive evidence, but rather admits that the low levels of Norwegian policies leave minimal room for *experimentation*, and is phrased with conditionals such as that increasing legal hunting quotas *may* reduce poaching.[128] Therefore, this paper does not provide any conclusive proof whatsoever, but rather points to the possible risks of different policy choices on a theoretical level and based on a non-EU country. This is important inasmuch as this experimentation might be a valid policy option inside the Norwegian legal framework, but it definitely is not in the EU after the *Tapiola* ruling, which already articulated the precautionary principle to avoid these experimental trials from taking place with strictly protected species. Regarding the multiple parts where CABs decisions admit that current studies do not show that license hunting increases social tolerance at the moment, the Court remains completely silent, and considers that CABs have 'stated clear objectives' and 'the decision refers to scientific support for the assessments'.[129]

Although one could wonder if this lack of evidence on the effectiveness of this hunt to maintain FCS is due to the fact that, for starters, Swedish authorities do not even see that as the main objective, this is not the case in either of the three court rulings analyzed. Indeed, they all follow a similar formula, where they state that the purpose of the hunt is to account for socio-economic and psychosocial impacts, and that, in doing so, this can help with the FCS of the species.[130] However, the purpose seems elusive as it changes during the rulings depending on what needs to be justified: for example, while in the purpose section, all three rulings mention the importance of these hunts for FCS, they all seem to revolve around the motives of article 16.1.b when it comes to justifying the absence of alternatives.[131] The fact that the goal is so unclear makes it impossible to show with significant certainty that the means are appropriate for achieving the ends. Whether this unclarity is deliberate, in order to circumvent the limitations of let-

[126] C-2166-22 (n. 123) 5.
[127] Bjørn P Kaltenborn and Scott M Brainerd, 'Can Poaching Inadvertently Contribute to Increased Public Acceptance of Wolves in Scandinavia?' (2016) 62 European Journal of Wildlife Research 179, 179–188.
[128] Ibid., 179.
[129] C-1843-22 (n. 44) 5. My trans.
[130] Ibid.
[131] C-1827-22 (n. 125) 12-13.

ter (b) and letter (c) with the pretext of letter (e), is for each one to decide.

Finally, the weak standard of proof required to establish the link between license hunting and a substantial decrease in poaching can be seen in the choice of words in case C-1827-22:

> It appears that the area (…) has a high concentration of wolves and the administrative court finds no reason to question that this can be expected to lead to increased damage and, by extension, other unwanted effects that may have negative consequences for the favourable conservation status.(…) The administrative court therefore assesses that the stated purposes are acceptable and can be expected to a sufficient degree to be achieved with the decided hunt.[132]

This excerpt shows how the concept of poaching is being overshadowed by the rather more general notion of FCS, as something that can obviously be affected by socioeconomic circumstances. This is not, however, what the *Tapiola* requires, but rather rigorous scientific evidence that shows a substantial decrease in poaching with a net positive effect. The standard of proof applied in these cases, apart from being reversed, emanates from the body of administrative law, since a human activity, i.e. hunting, has implied the exclusion of a strictly protected species from the Environmental Law jurisdiction and its inclusion in the administrative one.[133] Meanwhile, other equally protected species under EU law are subjected to Environmental Courts, used to other types of standard of proof and to the developments in environmental jurisprudence. Indeed, administrative courts are arguably more used to other 'general ideas of legal equity'[134] in detriment of newer environmental legal principles such as the precautionary principle, leading to a contradictory treatment of equally protected species depending on what human activity is inflicted upon them, instead of on the Directive's legal categorization.[135] As de Vido notes with regards to the assessment of scientific evidence in environmental law,

> Courts that do not specialize in environmental law, for example, 'have struggled to apply novel legal concepts embedded in bespoke environmental law regimes, (…)' and owing to issues related to scientific knowledge, 'establishing the facts on traditional rules of evidence (…) has been difficult'. It is even more difficult when it comes to apply precaution and other environmental principles, whose content and legal nature are particularly difficult to grasp.[136]

Indeed, SEPA's and CABs' decisions have been historically not scrutinized in much detail by administrative courts with regards to wolf hunting. A clear example can be found in the precedent-setting case in 2016,[137] where SEPA's choice of FCS was brought to the Supreme Administrative Court (hereinafter, HFD), and it was expected that the Court would scrutinize the Agency's choice of a result over the others. As previously explained, the results chosen belonged to the subset of researchers who openly justified a low

[132] Ibid., 6-7.

[133] *See* Parikka Altenstedt (n. 6) 28, 'This interpretation becomes problematic because it takes into account the human activity – a social and cultural practice, i.e. an activity directed towards the animal– that defines the legal status of the animal. Thus, the protection needs of some animals are defined by the needs of humans. Different animal species are not treated equally by the Authority even though their protection needs are legally established by EU law to be equal' (my trans).

[134] Staffan Westerlund, 'Fundamentals of Environmental Law Methodology' (Uppsala University, Department of Law 2007) 518 (37.19).

[135] Parikka Altenstedt (n. 6) 101.

[136] de Vido (n. 94), 1328 (footnotes omitted).

[137] HFD 2016 ref. 89.

FCS level because of social controversies, since FCS based only on ecological grounds would require a number too high for what society could allegedly tolerate.[138] 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 socioeconomic 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. Therefore, NGOs expected the HFD to assess this decision's legality. However, all that was said in this respect was that 'the Supreme Administrative Court has no reason to question the scientific basis on which the Swedish Environmental Protection Agency has based its assessment'[139]. Indeed, and as Gustav Stenseke notes in his doctoral thesis Entangled law, the approach of the Court towards the scientific research provided by SEPA was more procedural, rather than substantive. In his own words, 'they seemed to look at the reports a bit more as formalities, rather than examining their relations to the arguments again'[140]. The repeated use of the same formula in most rulings regarding wolf licensed hunting ('the administrative court finds no reason to question…'[141]) seems to shift the burden of proof to NGOs, rather than on the derogating authorities.

4.2 Other satisfactory alternative

First of all, it should be noted that nowhere whatsoever in any of the three rulings, when addressing other appropriate solutions, is poaching mentioned. Indeed, and as C-1827-22 says, 'there is no other suitable solution than license hunting to reduce the density of the wolf population, the impact on socioeconomic conditions and the impact on moose management in the selected areas'[142]. In fact, even if the purpose of protecting livestock could be subsumed in letter e), there would still be the question of how are different interests balanced in accordance with article 2 HD. The answer is very clear when the Court states, in C-2166-22, that 'the *fäbodbruken* farms referred to in the County Board's decision require domestic animals to graze freely, which is why fencing is not a suitable solution'[143]. It is self-evident that the objective has been substituted by the means, since saying that there is no alternative for reducing the population than license hunting, makes the same sense as saying that there is no alternative for derogating than to derogate. Indeed, when the objective is to derogate by and of itself, no possible alternative measures can be addressed.

4.3 Precautionary principle

Though there is not a reserved paragraph for assessing the precautionary principle, each court decision says that the principles of proportionality and precaution have been addressed in their decision regarding FCS.[144] However, it is rather questionable how a 13% risk of falling below FCS would be acceptable, unless of course one considers the precautionary principle as merely asking that one is certain about the uncertainty. Indeed, it is repeatedly mentioned in the rulings that the taxation developed by Skandulv 'ensures that all mortality parameters, including il-

138 Liberg and others (n. 54).
139 HFD 2016 ref. 89, 15. My trans.
140 Stenseke (n. 59) 285.
141 C-1827-22 p. 7. My trans; HFD 2016 ref. 89 p. 15. My trans.
142 C-1827-22, 12. My trans.
143 C-2166-22, 12 (emphasis added). My trans. 'Fäbodbruken' is a type of traditional farming, recently proposed by Sweden and Norway for the UNESCO List of Intangible Cultural Heritage, see also <https://unesco.se/sverige-och-norge-nominerar-fabodbruk-till-unescos-representativa-lista-over-immateriellt-kulturarv/> accessed 30 May 2023.
144 C-1843-22, 11.

legal hunting, are considered',[145] but the knowledge/certainty of the degree of uncertainty is not sufficient with regards to this environmental law principle, as the *Tapiola* clarified.[146]

In this case, the taxation developed by Skandulv could qualify as the best scientific data available required by the CJEU, and this puts a number on the risk that is being taken. Placing a percentage on the uncertainty does not make it go away, but rather it makes it more palpable. Thus, the acceptance of a 13% risk seems clearly contrary to the *Tapiola* case.

4.4 Selectiveness and strictly controlled conditions of the derogation

Here, as in the decisions of CABs, selectiveness is interpreted merely at the genetic and geographical level. While the court explains how the territory is specifically defined so that no wolves other than those subject to the hunt are killed,[147] and that no F1 (first generation immigrant) is located in the area, in the end, this just means that one can kill an entire wolf territory as long as there is exhaustive knowledge on the number of specimens affected and the boundaries of such territory. Like with the assessment of the precautionary principle, there seems to be a confusion between exhaustive knowledge of the risks assumed and compliance with the law. Just like knowing that the risk is of a 13% does not mean it fulfills the precautionary principle, knowing the number of animals, including F2s, breeding pairs and alpha males that will be killed and the demarcation details does not make it more selective, only more predictable and quantified.

The court did change, in C-2166-22, the demarcation of two hunting areas at the request of the CAB, so that the risk of targeting other wolves than the ones subject to the hunt was minimized.[148] In C-1827-22, the change did not concern the demarcation but the number of wolves subject to the area of Flatmossen, because 'this increases the chances that all individuals in the designated areas have the opportunity to be caught'[149]. Since this ruling concerned 18 wolves divided into 3 territories, the Court considered that the hunt would be selective if it concerned 6 specific wolves per territory.[150] This is closer to the meaning of selectiveness intended by the Directive and, arguably, by the *Tapiola* case, although the biological characteristics of the species and the identification of individuals in order to avoid targeting the breeding pairs is still not met, since this would go against the main purpose of erasing whole wolf territories. However, once again, the analysis of the legality of the hunt is trumped by the lack of clarity in its objectives.

4.5 Favourable Conservation Status and limitedness

The reason why Favourable Conservation status is assessed together with limitedness in the rulings has to do with the previous way of assessing article 16.1.e by Swedish Courts. Indeed, previous years' rulings considered the hunt limited as long as it did not affect FCS.[151] Despite the *Tapiola* ruling clarifying that more than that was required, this was standard procedure until the 2023's hunt, making the inclusion of limitedness in letter e) quite futile, since, if this is supposed to mean the same as FCS, the legislator would not have included this extra requirement in letter e). However, this approach was endorsed by the HFD in the precedent setting 2016 ruling, where it shielded SEPA's discretionary decision from judicial scrutiny. It is worth asking if this

[145] Ibid., p. 9. My trans.
[146] *Tapiola*, para 66.
[147] C-1843-22, 6.
[148] C-2166-22, 8.
[149] C-1827-22, 5. My trans.
[150] Ibid., p. 8.
[151] HFD 2016 ref. 89, p. 19–20.

would have been the case after the *Tapiola* ruling and its stricter requirements regarding scientific evidence, which put a clear legal mandate on the Court to scrutinize the rigorous scientific evidence relied on by public authorities.

The NGOs noted that FCS was not met, even according to the studies endorsed by SEPA and confirmed by the HFD, since there was not a new immigrant in the population and Sweden could not include the Norwegian immigrant according to the *Tapiola* ruling. However, the court considered that the lack of an immigrant in the Swedish population, as required by SEPA's report, was not sufficient grounds to depart from it 'as the starting point'[152]. Moreover, since 'the majority of the sub-objectives' established by a SEPA's report from 2020 in relation to genetic reinforcement of wolves were met, and there was an immigrant in Norway, the reference value of 300 wolves was upheld by the court.[153] With regards to the *Tapiola* ruling, that states that, when measuring FCS, Member States should exclude third countries not dutybound by an EU obligation of species strict protection, the courts did not even attempt to justify its departure from the EU case law. They simply stated that the reference value did not lose legitimacy because of these reasons, 'regardless of the subsequent statement of the European Court of Justice on third countries'[154], which seems an open admission of non-compliance. In C-2166-22, they added another reason why FCS could still be upheld: the court did not interpret that 'the reference value of 300 individuals loses its legitimacy when a certain number of years have passed since a wolf immigrated'[155]. Nevertheless, this was a condition sine qua non by the researchers who did this study: that one immigrant would join the genetic pool every wolf generation, that is, every 5 years.[156] Surprisingly, in C-1827-22, the court did not even address the NGO claims related to the *Tapiola* prohibition on third countries when accounting for FCS.

Regarding the claims concerning the reduction that these hunts would entail for the wolves' natural range, the court answered that it found no reason to think 'that hunting in the territories in question entails a risk that the natural range of the wolf population will be reduced in the foreseeable future'[157], which seems rather odd since the same court admitted that the purpose of the hunt was to reduce wolf territories: 'To reduce the density of wolves, you need to reduce the density of wolf territories'[158].

When it was time to assess the limitedness of the hunt, one key element that is missing is the assessment of the impact at the local level, since it seems impossible to justify that a hunt intended to dissolve entire wolf territories will not have an impact at the local level. Indeed, the court admitted that 'The decided take is at a level that is projected to result in a national reduction in the number of breeding animals and break an upward trend'[159]. How this can amount to a net positive effect is, therefore, hard to comprehend. However, and drawing again on the confusing nature of the purposes, one could argue that reducing poaching was not actually the purpose of the hunt, and so no net positive effect would need to be proven, despite the multiple times where CABs definitely mentioned this purpose. Moreover, it would then be complicated to justify the use of article 16.1.e, since letter (b) or (c) already provide for the opportunity to account for the socioeconomic measures they seem to refer

[152] C-1827-22, 11. My trans.
[153] C-1843-22, 9.
[154] Ibid., 9. My trans.
[155] C-2166-22, 10. My trans.
[156] SEPA Report (n. 46) 7.
[157] C-1843-22, 10. My trans.
[158] C-1827-22, 6. My trans.
[159] C-1843-22, 10. My trans.

to, that is, attacks to livestock and socioeconomic consequences of overriding public interest.

The fragmented nature of the hunt, judged in separate rulings corresponding to each specific CAB's decision, also led to a deficient assessment of additive effects. In this sense, from the 3 rulings, 1 on Örebro and 2 on Värmland, the Court reduced one hunt in Värmland for a total of 9 wolves on the basis that it was partly held on Norwegian territory.[160] The limited nature of the other two hunts in Örebro and Värmland was justified on the basis of this previous reduction. Thus, despite 'the percentage of the population size touches the limit of what can be considered a limited quantity'[161], the reduction of the Värmland hunt for 9 wolves meant that 'the *remaining* total hunting take can still be assessed as sufficiently limited based *on a combined assessment of all aspects now considered*',[162] according to the court in the other two rulings.

Nonetheless, that Värmland hunt was appealed to the Sundsvall Court of Appeal, who disagreed on the grounds used to reduce the hunt, and sent the case back to the Luleå Court in order to address the other legal requirements which had not been assessed in its first judgment.[163] Thus, the Luleå Court finally permitted the killing of these extra 9 wolves. This means that the basis used in the other two hunts to justify their limitedness was ultimately lacking. However, the limited nature of the hunt was also justified by the Luleå Court on the fact that a larger harvest was in line with the delegating decision of SEPA.[164] But this argument is problematic, because it seems to imply that SEPA's decision is exempt from legal scrutiny and that the court analysis is done as if SEPA's decision is another law to which CABs must obey, instead of another decision subject to the analysis of the court.

5. Conclusions

Reasons for the lack of effectiveness of the Habitats Directive have already been located in its deficient implementation by Member States.[165] However, the importance of recognizing the role that contradictory legal epistemological frameworks play in this tension has seldomly been explored in the legal doctrine.[166] While Rome's foundational story revolves around a she-wolf saving the life of Romulus and Rem, in Sweden even the real name of the wolf (ulv) has been substituted by a euphemism (varg), whose pronunciation is even taboo for some people, according to journalist Lars Berge.[167] The subsequent antithetical treatment of the species by national legislation, despite sharing the same EU framework, is self-explanatory, and these diverging ontologies transpire despite the same norm (Habitats Directive) applying in all of them. Therefore, while Member States are only dutybound by an obligation of result when transposing the Directive, it is worth being asked if such a transposition can obviate the most crucial aspect of the law: what objective, and therefore what result, should the law pursue. The previous analysis has tried to show that these paradoxical epistemic frameworks (the Directive looking at how to protect, and hunting laws looking at how to kill), have resulted in administrative and judicial

[160] Administrative Court of Luleå, judgment 2022-11-30, Case No. 1825-22 (Swedish) (overruled).
[161] C-1843-22. My trans.
[162] C-1827-22, 12 (emphasis added). My trans.
[163] C-2166-22, 2-3. My trans.
[164] C-1843-22, 8. My trans.

[165] Commission, 'Fitness Check of the EU Nature Legislation (Birds and Habitats Directives)' (2016) <https://commission.europa.eu/system/files/2017-01/swd-2016-472-final_en.pdf> accessed 29 May 2023, 96.
[166] With the exception of Parikka Altenstedt (n. 6).
[167] Lars Berge, *La Hora Del Lobo* (Alejandra Ramírez tr, Editorial Almuzara, 2022) (Spanish) 95–96; Berge, Lars, *Vargattacken* (Stockholm: Albert Bonniers förlag, 2018) (Swedish).

decisions that do not follow the jurisprudence of the CJEU.

The Habitats Directive does not set a mere list of prohibitions and exceptions to insert in each national legal regime, but rather calls for an adaptation of old anthropocentric legal paradigms to the current biodiversity crises.[168] Trying to make both views compatible seems to lead to never-ending infringement proceedings with the Commission, and the *Tapiola* case, while giving clear and sharp advice, has been completely disregarded by the Swedish authorities, who have named the case along their decisions but have not actually implemented most of its requirements. Thus, effective implementation of EU law will not happen unless the real objectives of the Directive are also transposed for large carnivores in Swedish legislation.

Meanwhile, Swedish administrative law is proving unable to hold authorities accountable for their breach of the Habitats Directive, which is noticeable in the piecemeal approach of the caselaw analyzed in section 3. Here, individual hunts in each county were analyzed by the Court, but SEPA's guidelines and decision on the 2023 hunt, rather than being subjected to judicial scrutiny, were used as a template to assess the legality of the hunts. While a regionalized system for large carnivore management is necessary to increase legitimacy, this cannot be at the expense of shielding administrative decisions from judicial scrutiny. Not only is the standard of proof in administrative courts arguably different than the one used in environmental courts, where there is specialized staff used to analyzing scientific evidence in environmental matters, but additive effects could be neglected as it happened in the 2023 hunt. This is because, through the division of the global national hunt in several ones to be analyzed separately by the court, it actually relied on a previous ruling where it had reduced the hunting quota in order to justify the limitedness of two subsequently judged hunts, but since the former ruling was appealed and the hunting quota was finally not reduced, cumulative effects were not properly accounted for.

Moreover, the conspicuous use of letter (e) in art. 16 HD to circumvent the limitations of letter (b) and (c), is done through the salami-slicing method explained in section 2. It includes, in the case at hand, the establishment of ambitious purposes such as increasing social tolerance with hunts that ultimately improve FCS, but focusing exclusively on subordinate premises to improve social tolerance when the time comes to back those statements with sufficient scientific evidence or to frame those measures inside the requirements of article 16 HD. After the legal analysis developed along these lines, it seems safe to say that the 2023 Swedish wolf hunt would hardly pass the scrutiny of the CJEU in most of its elements. The fact that Swedish courts have acknowledged the existence of contradictory CJEU caselaw with regards to the inclusion of wolves from third countries,[169] and yet have decided to disregard it with an infringement proceeding open, raises questions in terms of the Commission's role to restore the rule of law.

Recently, a complainant brought this matter to the European Ombudsman.[170] The complaint was based on the fact that 'the European Commission has not yet concluded an ongoing infringement investigation about Swedish legisla-

[168] However, some authors have criticized the Habitats Directive for its anthropocentrism, cf. Katarina Hovden, 'The Best Is Not Good Enough: Ecological (Il)Literacy and the Rights of Nature in the European Union' (2018) 15 Journal for European Environmental & Planning Law 281.

[169] C-1843-22, 9.

[170] European Ombudsman, 'Decision on the time taken by the European Commission to bring to conclusion an infringement investigation about wolf hunting in Sweden' (Decision) 163/2023/PB.

tion and practices that allegedly breach the EU's Habitats Directive by allowing for unauthorized and excessive killing of wolves'.[171] Indeed, citizens' petitions for the European Commission to move forward with the infringement procedure have not yielded results, the last Reply of the Commission on March 2019 saying that they were 'in close contact with the Swedish authorities to follow up on the situation'.[172] However, the Ombudsman closed this case on the following grounds: despite the handling time of the infringement proceeding was very long, it was not characterized by lack of attention to EU law or a strategic approach to its resolution, and the Commission had informed the Ombudsman that, 'whilst no date has been fixed for the next step in the case, there is a reasonable assumption that the next stage could take place by the end of 2023'[173]. Since 'no further inquiries were justified at this stage'[174], the Ombudsman closed the case.

The surprise came on December 20th 2023, when the Commission issued a proposal for a Council decision to lower the protection status of the wolf under the Bern Convention, which is a necessary step in order to move the wolf from Annex IV to Annex V in the Habitats Directive.[175] This comes as a surprise since just one year ago, the same proposal was put forward by Switzerland in the Standing Committee of the Bern Convention, and the EU voted against.[176] Has the Commission given up on the possibility of some Member States adapting to the comeback of large carnivores? It is precisely this system of strict protection what has allowed for the recovery and comeback of the wolf where it had been extirpated through intensive hunting.[177]

This is not definitive, though. As of now, it is only a proposal to the Council of the European Union. However, if the Council adopts it, the lowering of wolf protection in the Bern Convention's Standing Committee will likely be approved by the required two-thirds majority, since the EU counts for 27. Hence, if the change in wolf protection is consummated and the EU subsequently alters the Habitats Directive Annexes as well, there will be no point in pursuing the infringement proceeding against Sweden. The epistemological framework of the Habitats Directive, though, would still apply. A hunting regime for the wolf would still be subjected to the prerequisite of favourable conservation status as mandated in article 14, and article 2's overall epistemic hierarchy would still locate biodiversity conservation as the overarching goal of the Directive.

In the meantime, legal analysis should focus on the existing framework as this article attempts to do. An assessment of the reasons for killing wolves in Swedish law leads to the conclusion that wolves are doomed by their own predatory nature. Indeed, if wolves hunt wild animals, which is what apex predators do, hunters will kill them because they are competing for game. If, instead, they kill livestock which is left completely unfenced and unprotected in the midst of the forest,[178] they will be killed as well for attacking private property. What's more, even

[171] Ibid.
[172] European Parliament, Committee on Petitions, 'Petition No 0011/2015 Johanna Parikka Altenstedt (Swedish) on the steps taken by the Commission in a case concerning wolf hunting in Sweden (Notice to members) p. 1, PE575.008v06-00.
[173] European Ombudsman, 2 (n. 170).
[174] Ibid.
[175] Commission, 'Proposal for a Council Decision on the position to be taken on behalf of the European Union on submitting proposals for amendment of Appendices II and III of the Convention on the conservation of European wildlife and natural habitats with a view to the meeting of the Standing Committee of the Convention' COM (2023) 799 final.
[176] Ibid., p. 2.
[177] Guillaume Chapron et al., 'European Commission may gut wolf protection' [2023] 382/6668 Science p. 275.
[178] C-2166-22, 12.

if wolves did not eat anything at all, if a loose hunting dog approached their territory and the pack defended its den from intruders, since this could also lead to an attacked dog, wolves would be shot as well. Thus, biodiversity conservation appears a weak contender in the priority list of Swedish wildlife agencies. When looking at the valid law, one comes to the conclusion that national law has become a subterfuge to mask old epistemic frameworks under weak transpositions. As it is unlikely that the Commission will take further steps in this infringement proceeding, strict wolf protection, as envisaged in the Habitats Directive for the last 31 years, might be dodged by Sweden and end up being all bark and no bite.