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Memorandum

To Jaakko Silpola
Finnish Hunters' Association

From Jan Bouckaert° Stefanie François°
Stibbe bv/srl Stibbe bv/srl
Tuur Desloovere°
Stibbe bv/srl

Date 24 November 2023

Re **Advice on the transposition and implementation of the Habitats Directive**

Dear Mr. Silpola,

We understand that there is some obscurity as to the discretion available to the Member States when transposing the Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (hereinafter: "*Habitats Directive*") in national law. More specifically, the question arises whether Member States are required to transpose the Habitats Directive (and more in particular, Article 16 thereof) verbatim.

Moreover, we understand that clarification is sought as to the implications of the judgements rendered by the Court of Justice in the cases C-342/05 and C-674/17.

Please find hereafter our advice.

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EXECUTIVE SUMMARY

Nothing in the Habitats Directive or the case law of the Court of Justice precludes a Member State to use a different wording when transposing Article 16 Habitats Directive. It suffices that the transposition is clear and takes into account all conditions set out in Article 16(1)(e) Habitats Directive. It is also possible to include additional conditions in the legislative framework from those that follow from Article 16(1)(e) Habitats Directive. Such conditions may for instance reflect Article 2(3) Habitats Directive. This was also done in the Swedish Hunting Ordinance whereby the Swedish Environmental Protection Agency is allowed to include conditions that are appropriate with regard to the inconvenience caused by the presence of dense large carnivore populations in derogation permits.

Moreover, it follows from the judgment rendered in case C-342/05 that a derogation is possible even if the conservation status of the species concerned is unfavourable albeit under specific conditions. From the judgment rendered in case C-674/17 it is clear that derogatory permits can be issued on the grounds of Article 16(1)(e) Habitats Directive with the objective of combating poaching. Neither of these judgments could form the basis for a penalty payment pursuant to Article 260(2) TFEU if Finland were to change its legislation as to the transposition of Article 16(1)(e) Habitats Directive.

1 NO OBLIGATION TO TRANSPOSE THE HABITATS DIRECTIVE VERBATIM

1. According to Article 288 of the Treaty on the Functioning of the European Union (hereinafter: “TFEU”), a directive is binding as to the result to be achieved, but leaves to the national authorities the choice of form and methods for implementing the directive in question in domestic law. The transposition of a directive into national law does not require provisions to be incorporated formally and verbatim in express, specific legislation. A general legal context may, depending on the content of the directive, be adequate for the purpose provided that it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner.¹

2. This makes sense since directives are used when it is difficult to devise regulations with the requisite specificity there where Member States have variations in the political, administrative, and social arrangements.² Article 2(3) Habitats Directive indeed provides that “*measures taken pursuant to the Directive shall take account of economic, social and cultural requirements and regional and local characteristics*”, thereby confirming the rationale for using the directive instrument.

3. The foregoing does not preclude that the transposition of the Habitats Directive must be faithful, clear and precise. This condition is met if the national legal framework ensures the full and complete application of the directive and allows the harmonised and effective implementation of the rules which it lays down.³ Ambiguity in national provisions is incompatible with the requirement for a precise and clear transposition.⁴

4. Article 16 Habitats Directive allows Member States to derogate from Articles 12, 13, 14 and 15(a) and 15(b)⁵ Habitats Directive provided that there is (i) no other satisfactory solution and (ii) the derogation is not detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their national range. A derogation may only be granted on the grounds exhaustively listed in Article 16(1)(a)-(d) Habitats Directive. In addition, Article 16(1)(e) provides a more general ground for derogation as it is not limited to a certain situation or objective. However, Article 16(1)(e) Habitats Directive is subject to four additional conditions. The derogation is more specifically only allowed (i) under strictly supervised conditions; (ii) on a selective basis; (iii) to a limited extent and (iv) in limited numbers.

¹ Case C-96/95 *Commission v Germany* [1997] EU:C:1991:87, para 6. See also the Commission’s Guidance document on Article 16 Habitats Directive ([https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C\(2021\)7301](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=PI_COM:C(2021)7301)), page 45, mentioning this case law.

² P Craig and G De Búrca, *EU Law: Text, Cases and Materials* (7th edn, OUP 2020) 139.

³ Case C-6/04 *Commission v United Kingdom* [2005] ECLI:EU:C:2005:626, para 27.

⁴ Case C-508/04 *Commission v Austria* [2007] ECLI:EU:C:2007:274, para 116.

⁵ *I.a.*, the duty to take the requisite measures to establish a system of strict protection for animal species listed in Annex IV (a) Habitats Directive in their natural range, prohibiting all forms of deliberate capturing or killing of specimens of these species in the wild.

5. The Court of Justice has ruled on numerous occasions that a national derogation regime is only consistent with Article 16 Habitats Directive if it is subject to the same conditions. It must follow from the wording of the national legal framework in a precise and clear manner that derogations can only lawfully be granted if the aforementioned conditions are met.⁶ In addition, it is also required that the administrative practice is aligned with the derogatory framework of Article 16 Habitats Directive. In other words, a full transposition of Article 16 Habitats Directive does not only require all its derogatory conditions to be introduced in the national legislation. The administrative decisions that are issued based on that framework must also demonstrate a substantive assessment of these conditions.⁷ On the other hand, merely providing an administrative practice consistent with a directive's provisions is not sufficient to transpose the Habitats Directive correctly. The presence of a national legal framework consistent with Article 16 Habitats Directive is therefore a *sine qua non*.⁸

6. The aforementioned case law does not preclude the use of different language than the language used in Article 16 Habitats Directive. Specifically within the context of Article 16 Habitats Directive this was confirmed by the Advocate-General J. KOKOTT in the case C-6/04 as follows:

“This derogation is not expressly provided for in the Habitats Directive. However, it would be compatible with the Habitats Directive if it correctly transposed either the prohibitions in Articles 12(1) and 13 in the sense of a delimitation or the derogations in Article 16.”⁹

7. In the case C-342/05 the Court of Justice considered as regards the legislative background that Articles 12 and 16 Habitats Directive have been transposed “*in substantially identical terms in the Finnish legislation on hunting*”.¹⁰ In other words, the wording was not an exact copy of Article 16 Habitats Directive but the provisions nevertheless covered the same. Both the Court and the Advocate-General observed that the European Commission did not contest the Finnish legislation. The European Commission merely criticised the administrative practice of the Finnish authorities regarding wolf hunting.

8. The case C-342/05 and, more in particular, the European Commission's abstention to challenge the Finnish legislation, confirm that it is indeed possible to transpose Article 16 Habitats Directive in a different wording.

⁶ Case C-98/03 *Commission v Germany* [2006] ECLI:EU:C:2006:3, para 61; Case C-508/04, *Commission v Austria* [2007] ECLI:EU:C:2007:274, para 112.

⁷ Case C-342/05 *Commission v Finland* [2007] ECLI:EU:C:2007:341.

⁸ Case C-508/04 *Commission v Austria* [2007] ECLI:EU:C:2007:274, para 113.

⁹ Case C-6/04 *Commission v United Kingdom* [2005] ECLI:EU:C:2005:626, Opinion of AG Kokott, para 116.

¹⁰ Case C-342/05 *Commission v Finland* [2007] ECLI:EU:C:2007:341, para 6.

9. As regards case C-674/17¹¹, we note that the Court of Justice did not rule on the consistency of the Finnish legal framework with Article 16 Habitats Directive. The Court of Justice ruled on whether or not Article 16(1)(e) Habitats Directive precludes the adoption of decisions granting derogations by way of hunting for population management purposes, the objective of which is to combat poaching, where the conditions set out under Article 16 (1)(e) Habitats Directive are not met. Nothing can be deduced from this judgment in terms of the validity of the current national legal framework. The Court of Justice merely reiterated that compliance with Article 16(1)(e) Habitats Directive requires that the conditions therein are met, not only through the legal framework, but also through the administrative practice (by way of individual derogations).

10. An example of a derogation permit regime in which the wording of Article 16 Habitats Directive has not been transposed verbatim, and in which specifications have been added in the legal provisions itself, can be found in Swedish law. §23 *Jaktförordning* (1987:905) (Hunting Ordinance) provides, with respect to hunting licences granted in accordance with Article 16(1)(e) Habitats Directive:

“§23.c The prerequisite for allowing licensed hunting of bear, wolf, wolverine and lynx is that there is no other suitable solution and that the hunting does not impede the maintenance of a favorable conservation status of the species' population in its natural range. In addition, hunting must be appropriate to the size and composition of the populations and must be selective and under strictly controlled conditions.

§23.d If the conditions under Section 23.c are fulfilled and nothing else follows from Section 24.a, the Swedish Environmental Protection Agency may decide on licensed hunting for bear, wolf, wolverine and lynx.

A decision on hunting according to the first paragraph may be drawn up and combined with conditions that are appropriate with regard to the inconvenience caused by the presence of dense large carnivore populations.” (Stibbe translation)

By means of §23.d.2, the Swedish Hunting Ordinance allows the Swedish Environmental Protection Agency to include conditions that are appropriate with regard to the inconvenience caused by the presence of dense large carnivore populations in derogation permits. Nothing in the Habitats Directive or the Court of Justice’s case law precludes this. After all, before these conditions can be formulated, the conditions under § 23.c have to be met. These conditions coincide with the conditions under Article 16 Habitats Directive. The sole remark we would have in this regard is that, strictly speaking, it would appear that no reference is made to the “limited extent” in which a derogation can be granted. This condition must, according to Article 16(1)(e) Habitats Directive, be distinguished from the condition that the derogation is “selective”. However, we note that the Swedish *Högsta*

¹¹ Case C-674/17 *Tapiola* [2019] ECLI:EU:C:2019:851.

förvaltningsdomstolen (Supreme Administrative Court) in its judgment dated 30 December 2016 (Nos. 2406–2408-16 and 2628–2630-16) ruled that this provision (and more specifically, the requirement that hunting must be “*appropriate to the size and composition of the populations*”) must be understood as requiring that the hunting take place to a ‘limited extent’ (see § 5.3.3 of the judgment). Bearing in mind this interpretation, the Swedish provisions constitute a sufficient transposition of Article 16(1)(e) Habitats Directive in national law. We are unable to formulate an opinion as to the current Swedish administrative practice. It is recalled that a full transposition requires both the legal framework and the administrative practice to be in accordance with Article 16(1)(e) Habitats Directive (see *supra*, no. 5).

However, we are aware of pending infringement proceedings on the matter of granting derogations for wolf hunting in Sweden.¹² From the Commission’s communications, we understand that these infringement proceedings primarily target the administrative practice in Sweden, and not the Swedish legislative framework on derogatory permits, as the Commission’s critique regards the non-consideration of conditions that are actually explicitly provided for in the Swedish legislation (possibly, with the exception of the condition related to the “limited extent”, see previous paragraph):

*“In particular, Sweden is failing to meet its obligations because it is not considering other satisfactory alternatives and is not ensuring that the licensed hunts are undertaken under strictly supervised conditions, on a selective basis and to a limited extent. Sweden is also failing to demonstrate that hunting would not threaten the growth of the local wolf population to reach a ‘favourable conservation status’.”*¹³

Therefore, this does not alter our analysis of current Swedish legislation.

2 A POPULATION CAN BE HUNTED UNDER ARTICLE 16(1)(E) HABITATS DIRECTIVE IN CASE ITS POPULATION STATUS IS UNFAVOURABLE

11. In Case C-342/05, the Court of Justice ruled that the grant of derogations under Article 16(1) Habitats Directive is possible by way of exception where it is duly established that these derogations are not such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status.¹⁴ This implies that derogations can be granted even if the population status is unfavourable. In later rulings, the Court has repeated this stance, but added

¹² See infringement INFR(2010)4200 (https://ec.europa.eu/atwork/applying-eu-law/infringements-proceedings/infringement_decisions/index.cfm?lang_code=EN&typeOfSearch=false&active_only=0&noncom=0&r_dossier=INFR%282010%294200&decision_date_from=&decision_date_to=&title=&submit=Search) confirmed to be ongoing by the European Commission on 2 May 2023 in its answer to a parliamentary question E-000826/2023 (https://www.europarl.europa.eu/doceo/document/E-9-2023-000826-ASW_EN.pdf).

¹³ European Commission, ‘June Infringement package: key decisions’ (18 June 2015) (https://ec.europa.eu/commission/presscorner/detail/EN/MEMO_15_5162).

¹⁴ Case C-342/05 *Commission v Finland* [2007] ECLI :EU :C :2007:341, para 29.

that the grant of such derogations by way of exception must be assessed also in the light of the precautionary principle.¹⁵ This means that if, after examining the best scientific data available, there remains uncertainty as to whether or not a derogation is such as to worsen the unfavourable conservation status of those populations or to prevent their restoration at a favourable conservation status, the Member State must refrain from granting or implementing that derogation.¹⁶

3 THE OBJECTIVE OF REDUCING POACHING CAN BE PURSUED UNDER ARTICLE 16 (1)(E) HABITATS DIRECTIVE

12. In Case C-674/17, the Court of Justice held that combating poaching can be relied upon as a means of contributing to the maintenance or restoration of the species concerned at a favourable conservation status, and, therefore, as an objective covered by Article 16(1)(e) Habitats Directive.¹⁷ However, the national authority must be able to establish, in the light of rigorous scientific data, that the derogations granted under this objective are appropriate with a view to achieving it.¹⁸ This is particularly relevant within the context of the “*no other alternative solution*”-test. Naturally, derogations granted under this objective must also fulfil all other conditions of Article 16(1)(e) Habitats Directive.

4 THE FINNISH COURT OF JUSTICE RULINGS ON WOLVES DO NOT IMPLY THAT FINLAND WOULD EXPOSE ITSELF TO A FINE IF IT WERE TO ADOPT A SWEDISH STYLE LEGISLATION

13. Article 260(2) TFEU provides that the Court of Justice may impose a lump sum or penalty payment on a Member State if it finds that the Member State concerned has not complied with one of its judgments. Such penalty payment may only be imposed, though, after the Court of Justice has found that a Member State has failed to fulfil an obligation under the Treaties in an infringement procedure initiated by the Commission (Article 258 TFEU) or a Member State (Article 259 TFEU).¹⁹ After such judgment, the Member State must take the necessary measures to comply with it. It is only when the Member State fails to undertake these measures, that a lump sum or penalty payment may be imposed.

¹⁵ Case C-674/17 *Tapiola* [2019] ECLI:EU:C:2019:851, paras 68-69; Case C-271/19 *Commission v Finland* [2020] ECLI:EU:C:2020:291, C-217/19, para 84.

¹⁶ Case C-674/17 *Tapiola* [2019] ECLI:EU:C:2019:851, para 66.

¹⁷ Case C-674/17 *Tapiola* [2019] ECLI:EU:C:2019:851, para 43.

¹⁸ Case C-674/17 *Tapiola* [2019] ECLI:EU:C:2019:851, para 45.

¹⁹ R Geiger, D Khan and M Kotzur, *European Union Treaties* (C.H. Beck 2015) 868.

14. First and foremost, Case C-674/17 concerned a preliminary ruling procedure, *not* an Article 258 or Article 259 TFEU procedure. Therefore, this case cannot provide grounds for a lump sum or penalty payment in the sense of Article 260(2) TFEU.

15. Case C-342/05 concerned an Article 226 EC (current Article 258 TFEU) procedure on the transposition of Article 16(1)(b) Habitats Directive. It could therefore trigger a lump sum or penalty payment though only if Finland does not comply with the judgment rendered in Case C-342/05. This judgment only provides that wolf hunting cannot be authorized on a preventive basis, without it being established that the hunting is such as to prevent serious damage within the meaning of Article 16(1)(b) Habitats Directive. The judgment does not pronounce itself on Article 16(1)(e) Habitats Directive. Therefore this Case C-342/05 does not pose any threat as regards to a fine should Finland decide to change its legislation transposing Article 16(1)(e) Habitats Directive (to adopt a Swedish style legislation).

5 CONCLUSION

Nothing in the Habitats Directive or the case law of the Court of Justice precludes a Member State to use a different wording when transposing Article 16 Habitats Directive. It suffices that the transposition is clear and takes into account all conditions set out in Article 16 Habitats Directive. It is also possible to include additional conditions in the legislative framework from those that follow from Article 16(1)(e) Habitats Directive. Such conditions may for instance reflect Article 2(3) Habitats Directive. This was also done in the Swedish Hunting Ordinance whereby the Swedish Environmental Protection Agency is allowed to include conditions that are appropriate with regard to the inconvenience caused by the presence of dense large carnivore populations in derogation permits.

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Stibbe

We hope to have provided you with sufficient information and remain available for further information.

Kind regards,

Jan Bouckaert^o

Stefanie François^o

Tuur Desloovere^o