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Notice for the OJ

**Action brought on 19 September 2005 by the Commission of the European Communities
against the Republic of Finland
(Case C-342/05)**

(Language of the case: Finnish)

An action against the Republic of Finland was brought before the Court of Justice of the European Communities on 19 September 2005 by the Commission of the European Communities, represented by M. van Beek and I. Koskinen, acting as Agent, with an address for service in Luxembourg.

The Commission claims that the Court should:

declare that, by regularly permitting the hunting of wolves contrary to the principles for derogations laid down in Article 16(1) of Council Directive 92/43/EEC¹ of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of the directive;

order the Republic of Finland to pay the costs.

Pleas in law and main arguments

Article 16 of Directive 92/43/EEC is an exception to the system of the strict protection of species in Article 12, so that it must be interpreted strictly. Article 12(1) lays down two preconditions for derogating on the basis of points (a) to (e). First, the derogation must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range. Second, a derogation is possible only where there is no other satisfactory solution.

Since the level of protection of the wolf is not favourable in Finland and other alternative methods are available, and since permits for hunting wolves are regularly issued without there being a properly ascertained connection with individuals causing particularly significant damage, the hunting of wolves is permitted in Finland to an extent which exceeds the conditions laid down in Article 16(1) of Directive 92/43/EEC.

¹ - OJ L 206 of 22.7.1992, p. 7.

Reasoned opinion of advocate general

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OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 November 2006 ¹(1)

Case C-342/05

Commission of the European Communities
v
Republic of Finland

(Conservation of natural habitats and of wild fauna and flora – Hunting of wolves)

I – Introduction

1. In the present case the Court is called upon to give its view on the conditions for the coexistence of modern European society and predators which have already died out almost everywhere in Europe.

2. The Commission takes issue with the Finnish administrative practice in relation to permitting the hunting of wolves (*Canis lupus*). Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora ('the Habitats Directive' (2)) prohibits, inter alia, the deliberate killing and capture of wolves outside the Finnish reindeer management area. Nevertheless Article 16 of the Habitats Directive allows derogations from this prohibition under certain conditions. The practical application of Article 16 has not yet been considered in the Court's case-law.

II – Legal context

A – *The provisions of the Habitats Directive*

3. The objectives of the Habitats Directive are set out in Article 2:

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

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

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

4. The relevant legal prohibitions in relation to the protection of species are laid down in Article 12(1)(a):

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

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

...’

5. The wolf is identified as follows in Annex IV(a):

‘*Canis lupus* (except the ... Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management).’

6. Article 16(1) of the Habitats Directive determines the conditions subject to which derogations are possible:

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

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

(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

(c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

(d) for the purpose of research and education, of repopulating and re-introducing these species and for the breeding operations necessary for these purposes, including the artificial propagation of plants;

(e) to allow, under strictly supervised conditions, on a selective basis and to a limited extent, the taking or keeping of certain specimens of the species listed in Annex IV in limited numbers specified by the competent national authorities.’

7. The conservation status of species is defined in Article 1(i) of the Habitats Directive:

‘(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2.

The *conservation status* will be taken as “favourable” when

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and
- there is, and will probably continue to be, a sufficiently large habitat to maintain its populations on a long-term basis’.

B – *The Finnish provisions*

8. According to the Finnish Government’s account, which is not contradicted by the Commission, Articles 12 and 16 of the Habitats Directive have been transposed, largely word for word, into Finnish hunting law. (3)

9. However there are additional provisions relating to permits for killing wolves. (4) The competent game management district must give permission for the hunting of wolves in each individual case. However, the Ministry of Agriculture and Forestry sets the regional upper limits, that is to say the maximum number of wolves which may be hunted in individual districts during the hunting season from 1 November to 31 March. The upper limit is set so that in the event that it is reached the population in the relevant district is not endangered. All information about wolf mortality is taken into account, in particular mortality due to traffic accidents and to human activities.

10. In granting specific hunting permits the game management districts must have regard to the provisions of Article 16(1) of the Habitats Directive, which have been transposed into national law. They must also, when operating within the upper limit, take into account the specific information which is available to them on the death of wolves in the relevant district. It is possible to exceed the upper limit only if the preconditions in Article 16(1) are met and special ministerial permission is granted.

11. In addition the police may kill animals in exceptional circumstances. Article 16(1) of the Habitats Directive applies in this case too.

III – Pre-litigation procedure and forms of order sought

12. The Commission commenced the infringement procedure with a letter of formal notice dated 10 April 2001. After Finland had replied by letter dated 6 July 2001, the Commission sent a reasoned opinion on 4 July 2002. Finland responded by letter dated 28 August 2002.

13. Nevertheless, the Commission continues to consider that there has been an infringement of Community law and it commenced the present action on 12 September 2005.

14. It claims that the Court should:

- declare that, by regularly permitting the hunting of wolves contrary to the grounds of derogation laid down in Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of the directive;
- order the Republic of Finland to pay the costs.

15. The Republic of Finland contends that the Court should dismiss the action and order the Commission to pay the costs.

IV – Legal appraisal

16. In the present action the Commission does not take issue with either the Finnish provisions or specific individual cases of wolves being killed, but with the administrative practice of the Finnish authorities. This is possible. A failure to fulfil obligations may arise from the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with Community law. (5)

17. The Commission must establish such a failure to fulfil obligations on the basis of sufficiently documented and detailed evidence of the national administration's alleged practice for which the Member State concerned is answerable. (6) The practice must be, to some degree, of a consistent and general nature. (7)

18. Finland correctly points out that the question whether a Member State has failed to fulfil its obligations must be assessed as at the expiry of the time-limit which was set in the reasoned opinion, namely as at 4 September 2002 in the present case. However, contrary to Finland's interpretation, events after the expiry of the time-limit may also be taken into account as evidence of a *continuing* administrative practice. (8)

19. The parties are in agreement that the Finnish authorities issue permits for hunting wolves outside the reindeer management area every year. (9) A consistent administrative practice exists in relation to this. This practice is compatible with the Habitats Directive only if the requirements of Article 16(1) are observed.

20. Since Article 16(1) of the Habitats Directive is a provision derogating from the general provisions on the protection of species, in this instance – as with Article 6(4) of the Habitats Directive (10) and Article 9 of Birds Directive (11) – the burden of proving that the necessary conditions are present for each derogation rests with the authority taking the decision. (12) In relation to the present infringement proceedings it therefore follows that Finland must in principle prove justification for killing wolves.

21. However, where there is a dispute about an administrative practice this burden of proof cannot extend to the Member State having to demonstrate that all the preconditions for derogation are wholly fulfilled in relation to each individual case or even just in a large number of examples. On the contrary it is sufficient to give an overall description of the system of applying derogations, as Finland does.

22. If this description meets the requirements of Community law, it is for the Commission to demonstrate why in spite of this the practice of the Member State concerned infringes Community law. For this purpose the Commission may either object in abstract terms to parts of the system which has been described or submit specific objections to a sufficiently large number of individual cases. It must ascertain the necessary information about these individual cases either by means of requests for information to the relevant Member State (13) or by gathering it from other sources.

23. Article 16(1) of the Habitats Directive is similar to Article 6(4) of that directive and Article 9 of the Birds Directive not only in relation to the burden of proof but also as regards its content. All of the provisions determine precisely the preconditions under which the Member States may derogate from their obligations under the directive and must therefore be interpreted strictly. (14)

24. These derogating rules also give concrete expression to the principle of proportionality. (15) According to this principle, which is one of the general principles of Community law, measures adopted may not exceed the limits of what is appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued. (16)

25. The need for such an interpretation is apparent particularly in the relationship between the grounds for derogation listed in Article 16(1)(a) to (e) of the Habitats Directive and the consideration of satisfactory alternatives. Whether alternatives exist depends on the objectives of the relevant measure.

26. Consequently it is necessary, first of all, to identify the objective of the measure. The objective can justify the measure only if it can be attributed to at least one of the grounds for derogation, that is to say if the measure is appropriate to attain one of the purposes listed there. Even if it is possible to attribute the measure's objective to one of the grounds for derogation, the measure may not be implemented if its objective can be attained by less drastic means, that is to say by means of a satisfactory alternative within the meaning of Article 16(1) of the Habitats Directive. (17)

27. However an alternative is satisfactory not only if it would attain the objectives of the derogation equally well, but also if the disadvantages caused by the derogation would be disproportionate to the aims pursued and the alternative would ensure proportionality. This is the final part of the review of proportionality, called appropriateness or proportionality in the strict sense. (18)

28. As regards the grounds for derogation, the Commission objects to the fact that in Finland the killing of wolves is permitted under Article 16(1)(b) on grounds relating to prevention, that is for the purposes of avoiding damage. It maintains that on the contrary the application of this derogation requires that serious damage has first occurred. In this regard, the Commission relies on a judgment according to which a certain degree of damage is required for derogation from the general system of protection under the comparable provision in the third indent of Article 9(1)(a) of the Birds Directive. (19)

29. However, Finland correctly points out in opposition to this criticism of the preventative killing of wolves that, on its very wording, Article 16(1)(b) of the Habitats Directive – like the third indent of Article 9(1)(a) of the Birds Directive – is aimed at the prevention of damage. It would be manifestly disproportionate to require that it is necessary to first wait for damage to be sustained before measures are taken.

30. This interpretation does not contradict the judgment which the Commission has referred to. The passage cited from those infringement proceedings did not concern prevention but whether measures may also be taken in relation to minor damage and not only to prevent *serious* damage.

31. Regardless of the basic applicability of the derogation under Article 16(1)(b) of the Habitats Directive to preventative measures, there is the question of under what circumstances the killing of wolves is appropriate for prevention, of when less drastic alternatives exist and of whether the objective of prevention is proportionate to the interest in the conservation of the individual wolves.

32. The Court is able to review these three points only to the extent that the Commission sufficiently specifies its objections to the Finnish practice. The Commission does this exclusively with regard to the fact that the Finnish authorities do not issue hunting permits for particular wolves which cause damage, but in each case authorise in the abstract the killing of a particular number of wolves. By this submission the Commission questions both the appropriateness of the measures entailing killing for the purposes of preventing damage and the absence of a less harsh measure. On the one hand, it seems doubtful that damage can be prevented by the indiscriminate killing of wolves instead of concentrating on the animals which cause damage. On the other hand, it might be possible to achieve the same preventative effect by restricting the hunting to those few animals which cause damage.

33. It is first necessary to make it clear that the Commission's complaint fails in so far as it relates to the upper limits for hunting which are set for the individual game management districts by the competent ministry. According to the Finnish Government's submissions, which are undisputed, these upper limits only determine the framework within which the game management districts are able to issue permits, provided that *in addition* the preconditions of Article 16(1) of the Habitats Directive are fulfilled. They are accordingly a means of preventing hunting from being excessively detrimental to the conservation status of the species.

34. With regard to individual hunting permits, Finland submits that the permit to kill is related to particular individual wolves at any rate where they can be identified. It states that

the game management districts are aware of the local situation and ensure, in cooperation with the Riista ja kalatalouden tutkimuslaitos (RKTL – Game and Fisheries Research Institute), that the correct animals are killed.

35. However, it is apparent from the Finnish Government's account too that in the remaining cases hunting is in principle permitted in the form of specific numbers for slaughter being allocated to the respective game management districts. In relation to this Finland expresses the view – for the first time in the rejoinder – that with a herd animal like the wolf it is not possible to restrict the shooting permit to particular animals. It maintains that in part it is in practice even impossible, where damage is caused by a herd, to identify individual animals as having caused damage.

36. However, Finland's above submissions do not specify how shooting permits which are not specific to individual wolves contribute to preventing serious damage, that is to say whether this practice is appropriate at all for attaining this objective. In North America, wolf populations had to be *greatly* reduced over a fairly long period of time before losses of game decreased. (20) It cannot be ruled out that this also applies to harm to livestock. Finland defends itself, however, inter alia with the argument that the wolf population has increased in spite of the hunting – a decrease in damage therefore appears unlikely.

37. It would also be conceivable that the permits are only to facilitate direct defence against specific attacks, for example on dogs or sheep. However, there is no evidence to support that.

38. The Management Plan which was introduced into the proceedings by the Commission suggests a further explanation. According to the plan, the hunting of wolves is supposed to maintain their fear of people. As a result of this timidity, wolves will avoid people and their settlements and they have less opportunity to kill livestock or endanger people. (21) On the basis of this objective, hunting may amount to the prevention of damage within the meaning of Article 16(1)(b) of the Habitats Directive.

39. Wolves are indeed considered very timid but the damage caused by them shows that they do not completely avoid people. It is apparent from the application of the Finnish compensatory provisions for damage caused by wolves that in the years 2000 to 2003 wolves killed annually between 23 and 135 sheep, between one and nine cattle, 270 to 561 reindeer and 20 to 31 dogs. An increasing trend can be discerned at least in relation to sheep and reindeer. (22) If in fact those herds are hunted that come closest to people and cause the most damage, (23) it appears possible that as a result they will change their habits and maintain more of a distance in future.

40. However, on the basis of the information available, this theory likewise cannot justify indiscriminately permitting the shooting of a particular number of wolves. On the contrary it would require scientific corroboration before it could be accepted. This would have to provide explanation not only about the extent to which hunting is appropriate at all for maintaining wolves' fear, but also about the form in which it would have effect and would be of as little detriment as possible to the wolf population, for example whether, and if so under what circumstances, the herd's alpha animals or only young animals or even the entire herd should be killed. It would also have to be examined whether instead of killing wolves other measures, for instance those suggested by the Commission, suffice, namely bringing cattle into sheds at night or keeping them then behind effective fences, odours or other means of frightening off wolves, and compensation for damage caused.

41. Article 16(1) of the Habitats Directive also subjects each derogation from the strict protective provisions of Article 12 to the additional condition that derogation must not be detrimental to the maintenance of the populations of the species concerned at a favourable conservation status in their natural range.

42. Article 1(i) of the Habitats Directive bases the definition of the favourable conservation status of a species on three criteria. The second and third of these criteria relate to the natural range and the habitat of the species. In the present case there is no apparent doubt that these criteria as to a favourable conservation status are met.

43. However, there is a dispute as to the first criterion for a favourable conservation status, namely whether population dynamics data on the wolf indicate that this species is maintaining itself on a long-term basis as a viable component of its natural habitats.

44. It is not disputed that the Finnish wolf population has significantly grown in numbers in recent years and that it has also expanded considerably into new areas. Despite the shooting permits, the conservation status of the species has therefore not deteriorated overall but improved. Consequently one could conclude, like the Finnish Government, that the wolf population in Finland satisfies the requirements for a favourable conservation status.

45. The Commission is nevertheless of the opinion that in Finland the conservation status of the wolf was not favourable during the pre-litigation procedure and on expiry of the time-limit which it had set in the reasoned opinion, namely on 4 September 2002. The Commission supports this view with a study which assessed the wolf as being endangered in Finland on the basis of data from 1998 and with the Finnish Management Plan for the wolf. As Finland emphasises, the study is only of secondary importance in the present proceedings since the relevant point in time is 4 September 2002. The conservation status of the wolf population at that time is documented in the Management Plan.

46. The Management Plan assumes, even taking into account the migration of wolves from the population in Russian Karelia, that the Finnish wolf population is maintaining itself on a long-term basis as a viable component of its natural habitat in Finland only if it comprises at least 20 breeding pairs. (24) However, according to the plan, in 2002 – the relevant year – there were only 12 such pairs and in the previous years there were even fewer. By 2005 the number grew to 16 and therefore had not reached the threshold level for a viable long-term population. (25)

47. Finland states in reply to the Commission that the assessment of favourable conservation status does not depend on the concept of the smallest viable population, but on the population dynamics which, it argues, are clearly favourable.

48. The Finnish Government's above argument is not very convincing since it contradicts the assessment which its own Management Plan clearly made on the basis of the best available scientific knowledge. Consequently the conservation status of the wolf in Finland cannot be regarded as favourable at the relevant time.

49. In addition, contrary to Finland's view, it must be assumed that the shooting of individual wolves was disadvantageous for the population's conservation status. The fact that the populations grew despite the killings does not necessarily exclude the possibility that each of the killings, taken individually, initially harmed the conservation status. (26) If breeding wolves are shot, this reduces directly the number of breeding pairs which is decisive for the conservation status. However, shooting wolves which have not yet bred has indirect effects on the number of breeding pairs. If these specimens lived longer they would at some point leave their herd and possibly find a partner. (27) In view of the limited number of wolves in Finland, without the killing of individual specimens the conservation status of the population would therefore presumably have improved even more than it actually did.

50. Accordingly it cannot be found that the shooting was not detrimental to the maintenance of the Finnish wolf population at a favourable conservation status or that there was no detriment to the population. Consequently, for this reason too, at the relevant time a justification for the hunting of wolves could not be compatible with the wording of Article 16(1) of the Habitats Directive.

51. However, the Finnish Government justifiably raises the question as to whether under Article 16 of the Habitats Directive any justification of a measure which is disadvantageous for the strictly protected species in accordance with Article 12 is impossible in the absence of a favourable conservation status. That would mean that until a favourable conservation status is achieved for the species in Annex IV the Member States would not be able to allow any of the prohibited forms of detriment regardless of the objectives of a measure. This would amount to absolute protection for many species, since they are strictly protected because their conservation status is not favourable.

52. However, specifically in relation to immediate risk to those things that are most precious, for example human life and human health, it must be possible to derogate from the legal prohibitions relating to the protection of species, regardless of the conservation status of the species, if this is the only way of averting the danger. Consequently, a relaxation of the requirements for justifying detriment to strictly protected species is inevitable despite the necessity for a strict interpretation of Article 16(1) of the Habitats Directive. As Finland correctly submits the Commission recognises this, at least implicitly, in its guidance on the application of Article 12 and 16, since in this guidance it does not exclude the justification of derogations even where the conservation status is unfavourable. (28)

53. There is a basis for such a relaxation of the requirements in the Court's case-law, which has already recognised in relation to the law on nature conservation that exceptional grounds may justify detriment to legally protected interests in the natural world even if this would not be possible according to the text of the relevant provisions. (29) Those grounds must correspond to a general interest which is superior to the general interest represented by the ecological objective of the directive (in that case it was coastal protection and the danger of flooding). (30) The fact that the project in that case had specific positive consequences for the affected species was also taken into account. (31)

54. In practical terms, it is, as in the case of Article 16(1) of the Habitats Directive, a question of applying the principle of proportionality, which is certainly not restricted, with regard to the possible objectives of derogations, to the list of grounds for derogation under Article 16(1)(a) to (e) and above all does not recognise the condition requiring the maintenance of the species at a favourable conservation status.

55. In the present case, however, such a relaxation of the requirements of Article 16(1) of the Habitats Directive cannot justify the Finnish practice either. Since permission for the hunting of wolves is not restricted to those specimens which need to be killed in order to prevent damage and in addition no adequate scientific basis for its effectiveness has been put forward, it cannot be supposed that there were any exceptional grounds for the hunting.

56. It is therefore appropriate to uphold the Commission's action.

V – Costs

57. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission is successful and has applied for costs, the Republic of Finland must be ordered to pay the costs.

VI – Conclusion

58. I therefore propose that the Court should:

1. declare that, by permitting the hunting of wolves without being able to prove that the conditions were met for a derogation under Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of the directive;
2. order the Republic of Finland to bear the costs of the proceedings.

1 – Original language: German.

2 – OJ 1992 L 206, p. 7.

3 – The provisions are reproduced in the Finnish *Management Plan for the Wolf Population in Finland* of 2005,

<http://wwwb.mmm.fi/tiedoteliitteet/sudenhoitosuunnitelma.pdf>, p. 20; an English version can be found at the following address: http://wwwb.mmm.fi/julkaisut/julkaisusarja/2005/MMMjulkaisu2005_11b.pdf, p. 20. All of the citations below relate to this English version.

4 – Management Plan (cited in footnote 3, p. 28 et seq.).

5 – Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 47, with further references.

6 – *Commission v Germany* (cited in footnote 5, paragraph 49).

7 – *Commission v Germany* (cited in footnote 5, paragraph 50, with further references).

8 – Case C-494/01 *Commission v Ireland* (landfill of waste) [2005] ECR I-3331, paragraph 37 et seq.

9 – See also the Management Plan in relation to this (cited in footnote 3, p. 29).

10 – See, in relation to this, my Opinion in Case C-209/04 *Commission v Austria* (Lauteracher Ried) [2005] ECR I-2755, point 68, with further references; my Opinion in Case C-239/04 *Commission v Portugal* (Castro Verde) [2006] ECR I-10183, point 41, with further references; and, to that effect, the judgment in the latter case, paragraph 40.

11 – Case C-344/03 *Commission v Finland* (spring hunting of aquatic birds) [2005] ECR I-11033, paragraphs 36, 39, 42 and 60, and Case C-60/05 *WWF Italia and Others* [2006] ECR I-0000, paragraph 34.

12 – See the wording in *WWF Italia and Others*, cited in footnote 11.

13 – See, in relation to this, *Commission v Ireland* (cited in footnote 8, paragraph 42 et seq.).

14 – See, in relation to Article 16(1), Case C-6/04 *Commission v United Kingdom* (conformity) [2005] ECR I-9017, paragraph 25; in relation to Article 6(4), *Commission v Portugal* (Castro Verde) (cited in footnote 10, paragraph 35); and, in relation to Article 9 of the Birds Directive, *WWF Italia* (cited in footnote 11, paragraph 34).

15 – See, in relation to Article 6(4) of the Habitats Directive, my Opinions in Case C-127/02 *Waddenvereniging and Vogelbeschermingsvereniging* (Waddenzee) [2004] ECR I-7405, point 106, and in *Commission v Portugal* (Castro Verde), cited in footnote 10, point 42.

16 – Joined Cases C-96/03 and C-97/03 *Tempelman and van Schaijk* [2005] ECR I-1895, paragraph 47; Case C-220/01 *Lennox* [2003] ECR I-7091, paragraph

76; Case C-112/00 *Schmidberger* [2003] ECR I-5659, paragraph 79; Joined Cases C-27/00 and C-122/00 *Omega Air and Others* [2002] ECR I-2569, paragraph 62; and Case C-189/01 *Jippes and Others* [2001] ECR I-5689, paragraph 81.

17 – See, to this effect, the consideration of the similarly structured Article 9 of the Birds Directive in Case C-10/96 *Ligue royale pour la protection des oiseaux and Others* [1996] ECR I-6775, paragraphs 16 et seq. and 24 et seq.

18 – See above, point 24, with further references.

19 – Case 247/85 *Commission v Belgium* (conformity) [1987] ECR 3029, paragraph 56.

20 – Commission on Life Sciences (CLS), *Wolves, Bears, and Their Prey in Alaska: Biological and Social Challenges in Wildlife Management* (1997), pp. 183 and 184 (<http://fermat.nap.edu/books/0309064058/html>).

21 – Management Plan (cited in footnote 3, p. 49).

22 – Management Plan (cited in footnote 3, p. 17).

23 – According to the Management Plan (cited in footnote 3, p. 17) 10% to 20% of the wolves cause 80% of the damage.

24 – Management Plan (cited in footnote 3, p. 41 and pp. 15 and 16).

25 – Management Plan (cited in footnote 3, pp. 9 and 10).

26 – See Case C-209/02 *Commission v Austria* (Wörschach Golf Course) [2004] ECR I-1211, paragraph 27, and *Commission v Portugal* (Castro Verde) (cited in footnote 10, paragraph 24).

27 – See the Management Plan (cited in footnote 3, p. 11).

28 – Guidance document on the strict protection of animal species of Community interest provided by the ‘Habitats’ Directive 92/43/EEC, draft – version 5 (April 2006), Chapter III, paragraph 49 et seq., particularly paragraph 54 (pp. 63 and 64.) (http://forum.europa.eu.int/Public/irc/env/species_protection/library?l=/commission_guidance&vm=detailed&sb=Title).

29 – Case C-57/89 *Commission v Germany* (‘Leybucht’) [1991] ECR I-883, paragraph 21.

30 – *Leybucht* (cited in footnote 29, paragraph 23).

[31](#) – *Leybucht* (cited in footnote 29, paragraph 25).

Judgement (short version)

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Judgment of the Court (Second Chamber) of 14 June 2007 - Commission of the European Communities v Republic of Finland
(Case C-342/05) ¹

(Failure of a Member State to fulfil its obligations - Directive 92/43/EEC - Conservation of natural habitats - Wild fauna and flora - Wolf hunting)

Language of the case: Finnish

Parties

Applicant: Commission of the European Communities (represented by: M. van Beek and I. Koskinen, Agents)

Defendant: Republic of Finland (represented by: E. Bygglin, Agent)

Re:

Failure of a Member State to fulfil its obligations - Infringement of Articles 12(1) and 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) - Hunting of wolves

Operative part of the judgment

The Court:

Declares that, by authorising wolf hunting 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) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive;

Dismisses the action as to the remainder;

Orders the Commission of the European Communities and the Republic of Finland to bear their own costs.

¹ - OJ C 281, 12.11.2005.

Judgement (in full with reasoning)

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JUDGMENT OF THE COURT (Second Chamber)

14 June 2007 (*)

(Failure of a Member State to fulfil its obligations – Directive 92/43/EEC – Conservation of natural habitats – Wild fauna and flora – Wolf hunting)

In Case C-342/05,

ACTION under Article 226 EC for failure to fulfil obligations, brought on 14 September 2005,

Commission of the European Communities, represented by M. van Beek and I. Koskinen, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Finland, represented by E. Bygglin, acting as Agent, with an address for service in Luxembourg,

defendant,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, K. Schieman, J. Makarczyk, L. Bay Larsen (Rapporteur) and J.-C. Bonichot, Judges,

Advocate General: J. Kokott,

Registrar: R. Grass,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 November 2006,

gives the following

Judgment

- 1 By its application, the Commission of the European Communities seeks a declaration that, by authorising wolf hunting in breach of the grounds of derogation laid down in Article 16(1) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ 1992 L 206, p. 7) ('the Habitats Directive'), the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1) of that directive.

Legislative background

The Habitats Directive

- 2 Under Article 12(1) of the Habitats Directive:

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

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

...':

- 3 Annex IV to the Habitats Directive is entitled 'Animal and Plant Species of Community Interest in Need of Strict Protection'. Annex IV(a), as amended by the Act concerning the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1) ('Annex IV(a)'), mentions the following species: 'Canis lupus (except the ... Finnish populations within the reindeer management area as defined in paragraph 2 of the Finnish Act No 848/90 of 14 September 1990 on reindeer management)'.

- 4 Article 16(1) of the Habitats Directive states:

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

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

- (b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;

- (c) in the interests of public health and public safety, or for other imperative reasons of overriding public interest, including those of a social or economic nature and beneficial consequences of primary importance for the environment;

...':

- 5 The conservation status of species is defined in Article 1(i) of the Habitats Directive:

'(i) *conservation status of a species* means the sum of the influences acting on the species concerned that may affect the long-term distribution and abundance of its populations within the territory referred to in Article 2;

The *conservation status* will be taken as "favourable" when:

- population dynamics data on the species concerned indicate that it is maintaining itself on a long-term basis as a viable component of its natural habitats, and
- the natural range of the species is neither being reduced nor is likely to be reduced for the foreseeable future, and

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

Finnish law

- 6 It is clear from the documents before the Court that Articles 12 and 16 of the Habitats Directive have been transposed in substantially identical terms in the Finnish legislation on hunting.
- 7 However, there are specific regulations as regards authorisation to kill wolves. Wolf hunting is authorised on a case-by-case basis by the competent game management district. On the other hand, the upper regional limits, that is to say the maximum number of wolves which may be hunted in each district during the hunting season from 1 November until 31 March, are set by the Ministry of Agriculture and Forestry. The limits are set so that the wolf population is not threatened in those districts. All information on mortality is taken into account, particularly mortality resulting from road accidents and human activities.
- 8 In order to authorise hunting the game management districts must consider whether the conditions set out in Article 16(1) of the Habitats Directive, which has been transposed into national law, are satisfied. Furthermore, where an upper regional limit has been reached it may be exceeded only if the conditions laid down in Article 16(1) are complied with and a special ministerial authorisation is granted.
- 9 Moreover, although the police may kill animals in exceptional circumstances, they may only do so if the conditions set out in paragraph 8 of this judgment are respected.

The pre-litigation procedure

- 10 The Commission initiated the procedure for failure to fulfil obligations by sending the Republic of Finland a letter of formal notice on 10 April 2001. After that Member State had responded, by a letter of 6 July 2001, the Commission issued a reasoned opinion on 26 June 2002. In that opinion the Commission stated that since (i) the conservation status of the wolf was not favourable in Finland, (ii) alternative approaches could be employed and (iii) hunting permits were issued without any relationship to the particular wolves causing serious damage being established, wolf hunting as authorised did not satisfy the conditions laid down in Article 16(1) of the Habitats Directive. The Republic of Finland responded to the reasoned opinion by a letter of 28 August 2002.
- 11 However, taking the view that the failure to fulfil obligations complained of persisted, the Commission brought the present action on 14 September 2005.

The action

Arguments of the parties

- 12 The Commission states, first of all, that in Finland the wolf is an endangered species and, consequently, its conservation status cannot be regarded as favourable in that Member State.
- 13 Next, the Commission submits that the practice in Finland consisting in authorising hunting as a preventive measure is contrary to Article 16(1) of the Habitats Directive. Where it is thought highly likely that a wolf will cause serious damage, the latter may generally be avoided by means other than preventive killing. The use of repellents, scents, electric or other fences, the confinement of cattle or dogs at night or even compensation for damage sustained could be considered. Where hunting permits are issued on preventive grounds, it is highly unlikely that the wolves killed are those which cause the serious damage. In any event, those permits are issued by the Finnish authorities without any relationship with the particular wolves causing such damage being duly established. In those circumstances hunting is not a very effective means to prevent such damage.

- 14 Finally, the Commission states that the annual regional quotas set in advance by the Ministry of Agriculture and Forestry for a specific period are not justified, since derogations from the system of strict protection must be assessed regardless of the period concerned and be considered separately with respect to each hunting permit, in accordance with Article 16(1) of the Habitats Directive. Furthermore, the practice of the Finnish authorities leads to a situation in which wolves may be legally killed even though the maximum limit set by the Ministry of Agriculture and Forestry has been exceeded substantially. Thus, in the 2003-04 season in particular, although the maximum limit had been fixed at eight wolves, in addition eleven derogatory permits were issued and two permits were issued by the police. Ultimately, twelve wolves were killed during that season.
- 15 The Commission concludes that since the conservation status of the wolf in Finland is not favourable, alternative approaches may be employed and the hunting permits are issued without any relationship to the particular wolves causing serious damage being properly established, wolf hunting is authorised in Finland to an extent which infringes the conditions laid down in Article 16(1) of the Habitats Directive.
- 16 The Finnish Government argues that wolf hunting requires a permit, which may be obtained by written request to the local game management district stating the reasons for the request and the territory and number of animals concerned. The local game management district, having the appropriate information relating to its area, examines whether hunting impedes the maintenance of the species at a favourable conservation level, whether it is possible to find another satisfactory solution, and whether the conditions for derogation laid down in Article 16(1) of the Habitats Directive have been satisfied.
- 17 Furthermore, decisions to issue hunting permits are also taken with regard to an upper regional limit of specimens that may be hunted in each game management district, which is set by the Ministry of Agriculture and Forestry and corresponds to the number of specimens which may biologically be removed without the populations being endangered. It is not, therefore, a quota which must be attained or exhausted.
- 18 The Finnish Government submits that its practice does not prevent the maintenance in Finland of a favourable conservation status of the wolf population. That population has increased considerably in recent years. The same is true for the geographic population area. Moreover, the dynamics data on the species concerned indicates that it is likely to maintain itself on a long-term basis as a viable component of its natural habitats.
- 19 As regards the condition that there is 'no satisfactory alternative', the Finnish Government contends that many different means are used as far as possible, either alone or in combination, in order to prevent or reduce the damage caused by wolves. In any event, the game management districts consider all satisfactory alternatives before issuing a hunting permit. In that connection, the Finnish Government stresses the fact that the alternatives to which the Commission refers in the present case are not appropriate to each individual instance.
- 20 According to the Finnish Government, and contrary to the Commission's submissions, Article 16(1) of the Habitats Directive does not prohibit derogations from the system of strict protection in order to prevent serious damage. Further, it is not the case that the decisions by which the competent national authorities issue wolf hunting permits do not identify the wolves which cause serious damage. The decisions precisely determine the geographical areas covered by the permits where wolves causing such damage are present. However, since wolves live in packs the hunting permit cannot always identify the specimen(s) causing the damage. Nevertheless, where the particular wolves in question belonging to the pack are known, they are the subject of the hunting permit issued. Furthermore, where the animal concerned moves about alone, the hunting permit may also refer to it individually.

Findings of the Court

- 21 As the Advocate General rightly observes in point 16 of her Opinion, in this case the Commission does not challenge either Finnish legislation or a specific case of killing wolves, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.

- 22 A failure to fulfil obligations may arise due to the existence of an administrative practice which infringes Community law, even if the applicable national legislation itself complies with that law (see Case C-441/02 *Commission v Germany* [2006] ECR I-3449, paragraph 47).
- 23 It is clear from established case-law that in an action for failure to fulfil obligations it is for the Commission to prove the existence of the alleged infringement. It is the Commission which must provide the Court with the information necessary for it to determine whether the infringement is made out, and the Commission may not rely on any presumption for that purpose (see, inter alia, Case C-434/01 *Commission v United Kingdom* [2003] ECR I-13239, paragraph 21, and *Commission v Germany*, paragraph 48).
- 24 Thus, in the context of this action, it is incumbent upon the Commission to prove that the practice followed in Finland adversely affects the system, laid down by Article 12(1) of the Habitats Directive, providing strict protection for the wolf as a species listed in Annex IV(a), on the ground that derogations from that system are not granted in compliance with the conditions laid down in Article 16(1) of the directive (see, to that effect, *Commission v United Kingdom*, paragraph 22).
- 25 Since the latter provision provides for exceptional arrangements which must be interpreted strictly and must impose on the authority taking the decision the burden of proving that the necessary conditions are present for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 16(1) of the Habitats Directive (see, to that effect, Case C-60/05 *WWF Italia and Others* [2006] ECR I-5083, paragraph 34).
- 26 In this case it is common ground that:
- the Finnish authorities authorise wolf hunting each year, to a limited extent, by way of derogation;
 - according to the report on the threat to species in Finland in 2000, published in 2001 by the Ministry of the Environment and the Finnish Environment Centre (Pertti Rassi, Aulikki Alanen, Tiina Kanerva ja Ilpo Mannerkoski: (toim.): Suomen lajien uhanalaisuus 2000. Uhanalaisten lajien II seurantaryhmä. Ympäristöministeriö & Suomen ympäristökeskus, Helsinki 2001), the wolf is classified as an endangered species in Finland;
 - in that report, it is stated that the number of wolves capable of reproducing is less than 50, a figure which is the limit below which an acute danger of extinction exists;
 - according to point 7.2 of the Management Plan for the Wolf Population, published in 2005 by the Ministry of Agriculture and Forestry ('the management plan'), it can be estimated that Finland requires 20 breeding pairs in order to ensure the maintenance in the long term of a wolf population as a viable component of its natural habitats;
 - as regards 2001, 2002, 2003 and 2004, the number of breeding pairs was estimated, according to point 2.1.5 of the management plan, at 11, 12, 13 and 16 respectively.
- 27 It appears therefore, having regard to the criterion laid down in the first indent of Article 1(i) of the Habitats Directive, that at the end of the period set in the reasoned opinion the conservation status of the wolf in Finland was not favourable.
- 28 Article 16(1) of the directive makes the favourable conservation status of the populations of the species concerned in their natural range a necessary precondition in order for the derogations for which it provides to be granted (see Case C-508/04 *Commission v Austria* [2007] ECR I-0000, paragraph 115).
- 29 None the less, the grant of such derogations remains possible by way of exception where it is duly established that they are not such as to worsen the unfavourable conservation status

of those populations or to prevent their restoration at a favourable conservation status. Following the example of the views formulated by the Commission, in particular in paragraphs 47 to 51 of Section III of its Guidance document on the strict protection of animal species of Community interest under the Habitats Directive 92/43/EEC (final version, February 2007), it is possible that the killing of a limited number of specimens may have no effect on the objective envisaged in Article 16(1) of the Habitats Directive, which consists in maintaining the wolf population at a favourable conservation status in its natural range. Such a derogation would therefore be neutral for the species concerned.

- 30 It is clear from two decisions to issue wolf hunting permits, which were taken by the Finnish authorities before the Commission sent the letter of formal notice to the Republic of Finland and were produced before the Court by the Commission, that in both those cases the authorities permitted the hunting of a fixed number of wolves in a well defined geographical area, but without relying on an assessment of the conservation status of the species, without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative and without specifically identifying the wolves causing serious damage which could be killed.
- 31 Such decisions, which are not based on an assessment of the effect of the killing of the wolves that they authorise on the maintenance at a favourable conservation status of the population of that species in its natural range, and which do not contain a clear and sufficient statement of reasons as to the absence of a satisfactory alternative, are contrary to Article 16(1) of the Habitats Directive.
- 32 However, as is clear from paragraph 21 of this judgment, by this action the Commission does not seek to complain of specific cases, but criticises the administrative practice of the Finnish authorities regarding wolf hunting.
- 33 In that connection, the Court has held that, although a State's action consisting in an administrative practice contrary to the requirements of Community law can amount to a failure to fulfil obligations for the purposes of Article 226 EC, that administrative practice must be, to some degree, of a consistent and general nature (see, in particular, *Commission v Germany*, paragraph 50).
- 34 Furthermore, as is clear from settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion (see, inter alia, Case C-494/01 *Commission v Ireland* [2005] ECR I-3331, paragraph 29).
- 35 In this case, the Commission has not produced any of the decisions relating to the issuing of wolf hunting permits that the Finnish authorities have taken after the decisions noted in paragraph 30 of this judgment, with the exception of two decisions in 2006, to which it refers in order to emphasise the progress made in the matter by the Finnish authorities in the meantime.
- 36 Furthermore, the Commission, which in these proceedings has never pleaded a lack of sincere cooperation by the Finnish authorities as regards the communication of decisions relating to the issuing of hunting permits, has not provided the Court with any decision of that kind dating from the period corresponding to the end of the pre-litigation procedure and capable of providing the Court with the evidence necessary to ascertain whether the complaints are well founded.
- 37 Moreover, it must be recalled, as stated in paragraph 26 of this judgment, that the number of breeding pairs rose from 11 to 16 in the period from 2001 to 2004. Nor is it disputed that during the same period the total number of wolves present on Finnish territory rose from between 110 and 130 specimens to between 185 and 200 specimens.
- 38 Although that data is not in itself conclusive, it is in any event capable of showing that, in spite of the wolf hunting authorised by way of derogation in Finland, the conservation status of the species concerned substantially and consistently improved in that Member State

during the pre-litigation phase and a significant part of the period before the present action was brought.

- 39 Therefore, the Commission has not adduced sufficient evidence as to the existence of an administrative practice by the Finnish authorities of issuing wolf hunting permits without relying on an assessment of the conservation status of the species or without providing a clear and sufficient statement of reasons as to the absence of a satisfactory alternative.
- 40 As regards the complaint by the Commission relating to the fact that hunting permits are issued on a preventive basis or, in any event, without any relationship with the particular wolves causing serious damage being duly established, it must be observed, as the Advocate General has also noted in point 29 of her Opinion, that Article 16(1) of the Habitats Directive does not require serious damage to be sustained before derogating measures can be adopted.
- 41 However, it is the case that the Finnish Government admits that, as the wolf is an animal which generally lives in a pack, hunting permits cannot always target the specimen(s) which cause serious damage.
- 42 Although it cannot be automatically ruled out that authorising the killing of one or several wolves in a pack certain of whose members cause or are likely to cause such damage may prevent, eliminate or reduce that damage, it must be stated that the information on the file is not capable of confirming that hypothesis.
- 43 In that regard, as stated in point 5.4.5 of the management plan, certain parties are of the opinion that continued hunting keeps wolves wary of humans and thus helps to reduce damage, while others consider that hunting of wolves which belong to packs only increases damage. Furthermore, it is stated that little biological research on this topic is available.
- 44 In those circumstances, the Commission's complaint relating to the fact that hunting permits are issued on a preventive basis must be upheld.
- 45 As to the fact that decisions to issue wolf hunting permits are also subject to a maximum regional limit of specimens which may be killed in each game management district, this cannot be regarded as contrary to Article 16(1) of the Habitats Directive. That limit, which is set according to the number of specimens which may be killed without endangering the species in question, is, as the Advocate General has observed in point 33 of her Opinion, only the framework within which the game management districts may issue hunting permits where, in addition, the conditions in Article 16(1) of the Habitats Directive are fulfilled.
- 46 Having regard, in particular to what is stated in paragraph 8 of this judgment, the fact that during the 2003-04 season the limit in question was in fact exceeded cannot in itself be sufficient to prove that the Finnish authorities have issued hunting permits to an extent which may harm the maintenance at a favourable conservation status of wolf populations in their natural range.
- 47 Accordingly, by authorising wolf hunting 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) of the Habitats Directive, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive; the remainder of the Commission's application must be dismissed.

Costs

- 48 Under the first subparagraph of Article 69(3) of the Rules of Procedure, the Court may order that the costs should be shared or that the parties are to bear their own costs where each party succeeds on some and fails on other heads.

- 49 Since both parties have failed in one or several of their claims, they must be ordered to bear their own costs.

On those grounds, the Court (Second Chamber) hereby:

1. **Declares that, by authorising wolf hunting 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) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, the Republic of Finland has failed to fulfil its obligations under Articles 12(1) and 16(1)(b) of that directive;**
2. **Dismisses the action as to the remainder;**
3. **Orders the Commission of the European Communities and the Republic of Finland to bear their own costs.**

[Signatures]