Reports of Cases

OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 18 January 2024[1]

Case C-601/22

Umweltverband WWF Österreich,
ÖKOBÜRO – Allianz der Umweltbewegung,
Naturschutzbund Österreich,
Umweltdachverband,
Wiener Tierschutzverein
v
Tiroler Landesregierung

(Request for a preliminary ruling from the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria))

(Reference for a preliminary ruling – Environment – Directive 92/43/EEC – Conservation of wild fauna – Wolf hunting – Validity – Article 12(1) and Annex IV – System of strict protection for certain animal species – Article 16 – Exemption – Equal treatment between the Member States – Impact of the Court's answer on the dispute in the main proceedings – Admissibility of that question – Interpretation – Article 16(1) – Conditions for a derogation from the system of strict protection – Territorial scope of the assertion of the 'conservation status' – Article 16(1)(b) – Concept of 'serious damage' – Article 16(1) – Concept of 'satisfactory alternative' – Economic considerations)

I. Introduction

1. Wolves are frequent characters in stories.[2] The wolf in our story goes by the name 158MATK. It is considered responsible for the death of a significant number of sheep reared on the Alpine pastures of Tyrol, Austria.

[1] Original language: English.

[2] We have all grown up with the story about Little Red Riding Hood and the big bad wolf that ate her grandmother. However, wolves are not always villains in children's books. For example, in the story by Baruzzi, A., *Der Wolf hat Hunger* (Minedition, 2020), a wolf is considering converting to vegetarianism after eating a hedgehog. In the story by Ramos, M., *Le loup qui voulait devenir un mouton* (Pastel, 2008), one wolf would like to experience what life would be like as a sheep. According to the ancient legend of Romulus and Remus, the founders of Rome, were reared by wolves, as was Mowgly, the main character of Kipling, R., *The Jungle Book* (Macmillan, 1894).

2. For that reason, the Tiroler Landesregierung (Provincial Government of Tyrol, Austria) enacted a decision allowing for the culling of this wolf. Several animal and environmental protection organisations brought an action to annul that decision before the referring court, the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria).

3. The wolf (*canis lupus*) is a species in need of strict protection according to the Habitats Directive.[3] Therefore, the referring court asked that the Court clarify several issues arising in that directive. That should enable it to decide whether the Provincial Government of Tyrol's decision can be upheld.

II. The background to the dispute in the main proceedings, the questions referred and the procedure before the Court

4. In its report of 25 July 2022 ('the Expert Report'), the 'Wolf – Bear – Lynx' Expert Committee (Tyrol, Austria)[4] found that wolf 158MATK was responsible for killing approximately 20 sheep in a defined geographical area in the period between 10 June 2022 and 2 July 2022. Further, the same wolf was likely responsible for killing an additional 17 sheep in the period between 22 and 24 July 2022.

5. The same report found that livestock protection is currently not possible in the area concerned. It, therefore, concluded that wolf 158MATK represents an immediate and significant danger to grazing animals.

6. By an ordinance of 26 July 2022 ('the 158MATK ordinance'), the Provincial Government of Tyrol declared that the wolf with the designation 158MATK posed an imminent significant danger to grazing animals, agricultural crops and facilities. The ordinance came into force on 29 July 2022 and applies for an unlimited period.

7. The same day the Provincial Government of Tyrol adopted a decision ('the contested decision') exempting wolf 158MATK from the year-round prohibition on hunting wolves.[5] It explained that this was necessary in order to prevent serious damage to crops and livestock in specified hunting zones in which wolf 158MATK has been spotted. The exemption applying to wolf 158MATK was valid until 31 October 2022 (the end of the Alpine farming season), or was to expire earlier if molecular biological tracking clearly detected wolf 158MATK outside of the target area on multiple occasions.

8. The reasoning of the contested decision relied on the findings of the 'Wolf-Bear-Lynx' Expert Committee and, more precisely, on the answers provided by different experts in the hunting, agriculture, veterinarian and wildlife biology and hunting management industries.

9. The contested decision justified the culling of wolf 158MATK as being necessary in order to prevent not only serious damage, consisting of direct economic and non-economic damage resulting from concrete attacks, but also long-term damage to the economy.

[3] Annex IV, a), to 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), as amended most recently by Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ 2013 L 158, p. 193) ('the Habitats Directive').

[4] Paragraph 52a(1) of the Tiroler Jagdgesetz (Tyrolean Hunting Act 2004; 'the TJG 2004') reads that 'at the Office of the [Provincial Government of Tyrol], an independent "Wolf – Bear – Lynx" Expert Committee shall be established'.

[5] The general prohibition to hunt wolves is set out by Paragraph 36(2) of the TJG 2004, 'Hunting and closed seasons'.

10. Further, it was explained that there were no satisfactory alternative measures to culling that specimen, as the livestock herds on the Alpine pastures are small and their protection is not possible. The Expert Report demonstrated that 61 mountain pastures located in the area where the wolf at issue was detected, were to be classified as incapable of protection or as unreasonably and disproportionately protectable. At the same time, removing wolf 158MATK from the wild and keeping it in permanent captivity was not deemed a suitable option, as previously free-living wolves cannot adapt to life in captivity, but captivity causes them considerable suffering.

11. According to the opinion of one of the consulted experts, the removal of one wolf would not affect the favourable conservation status of the Alpine subpopulation of wolves in general. In Austria though, the favourable conservation status of wolves had not yet been met. Nevertheless, the report concluded that even when Austria was considered in isolation, no deterioration of the conservation status or hindrance to the restoration of favourable status was to be expected.

12. Five environmental organisations, namely Umweltverband WWF Österreich, ÖKOBÜRO – Allianz der Umweltbewegung, Naturschutzbund Österreich, Umweltdachverband and Wiener Tierschutzverein ('the applicant NGOs'), filed an appeal against the contested decision before the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol), the referring court in the present case. In substance, they claimed that the decision of 29 July 2022 does not fulfil the criteria of Article 16(1) of the Habitats Directive.

13. The relevant part of Article 16 (1) of the Habitats Directive reads as follows:

'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) :

…

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

14. Apart from the issues raised by the parties before the referring court, which relate to the interpretation of Article 16(1) of the Habitats Directive, the referring court raises an additional question. It seems to consider that Article 12 of the Habitats Directive, the legal basis for the strict protection of wolves, read in conjunction with Annex IV thereto, is invalid. The reason offered for such invalidity is the unequal treatment of Austria, contrary to Article 4(2) TEU, in comparison to those Member States which, by virtue of Annex IV, enjoy exemptions from the strict protection of wolves on the entirety of the territory or part of their territories, a treatment which Austria does not enjoy.

15. In those circumstances, the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Does Article 12 [of the Habitats Directive] read in conjunction with [its] Annex IV … according to which wolves are covered by the system of strict protection, exempting populations in several Member States, while no such exemption has been provided for Austria, infringe the "principle of equal treatment of Member States" enshrined in Article 4(2) TEU?

(2) Is Article 16(1) of [the Habitats Directive], according to which a derogation from the system of strict protection of wolves is only permitted if, inter alia, the derogation is not detrimental to the maintenance of the populations of the species concerned with a "favourable conservation status" in their "natural range", to be interpreted as meaning that the favourable conservation status must be maintained or restored not in relation to the territory of a Member State, but to the natural range of a population, which may encompass a significantly larger, cross-border biogeographical region?

(3) Is Article 16(1)(b) of [the Habitats Directive] to be interpreted as meaning that, in addition to direct damage caused by a particular wolf, "serious damage" also encompasses indirect (future) "economic" damage that cannot be attributed to a particular wolf?

(4) Is Article 16(1) of [the Habitats Directive] to be interpreted as meaning that 'satisfactory alternatives' are to be examined purely on the basis of actual feasibility or also on the basis of economic criteria, given the prevailing topographical, Alpine farming and business conditions in the Province of Tyrol?'

16. Written observations were submitted to the Court by Umweltdachverband, ÖKOBÜRO – Allianz der Umweltbewegung, Umweltverband WWF Österreich, the Provincial Government of Tyrol, the Austrian and Danish Governments, the Council of the European Union and the European Commission.

17. A hearing was held on 25 October 2023 at which Umweltverband WWF Österreich, ÖKOBÜRO – Allianz der Umweltbewegung and Umweltdachverband, Wiener Tierschutzverein, the Provincial Government of Tyrol, the Austrian, French, Finnish and Swedish Governments, the Council and the Commission presented oral argument.

III. Analysis

A. Admissibility

18. Before entering into the analysis, it is necessary to address the issue concerning the admissibility of this request for a preliminary ruling.

19. The contested decision has in the meantime expired. It allowed for the culling of wolf 158MATK only until 30 October 2022, so that the questions relating to its validity might seem hypothetical.

20. Nevertheless, and this was explained clearly in the order for reference, that decision was based on the 158MATK ordinance, which declared the wolf at issue a threat to grazing animals without any end date. Therefore, based on that ordinance, another decision allowing the culling of that particular wolf might be enacted at any moment.

21. I therefore consider that the request for a preliminary ruling is admissible.

B. Preliminary remarks and the structure of the Opinion

22. The Habitats Directive aims at safeguarding bio-diversity.[6] One way in which it endeavours to achieve that aim is by rendering certain plant and animal species subject to a regime of strict protection. Animal species that require strict protection, under its Article 12, are listed in Annex IV of the directive. That regime of strict protection, among others, requires Member States to prohibit, in the entirety of their territories, all forms of deliberate capture or killing of specimens of these species in the wild as listed in Annex IV.[7]

23. The wolves are, as a species (*canis lupus*), listed in Annex IV to the Habitats Directive.[8] Nevertheless, some Member States (or part of their territories) are exempted from providing for the strict protection of wolves by being expressly excluded from Annex IV.[9] Austria is not among them.

24. Member States may exceptionally derogate from the requirements of strict protection under Article 12 of the Habitats Directive in accordance with Article 16(1) thereof.

25. In Austria, wolves are present in two biogeographical regions: Continental and Alpine.

26. As noted by the environmental organisations participating in this case, to avoid confusion, it is necessary to explain that the Alpine biogeographical region is different from the Alps region populated by the subpopulation of wolves to which wolf 158MATK belongs. On the one hand, the Alps region covers the mountain range covering the South-East of France, Monaco, North of Italy, Switzerland, Liechtenstein, the South of Germany, Austria and Slovenia. On the other hand, the Alpine biogeographical region is one of the European biogeographical regions of the Natura 2000 network,[10] which is larger than the Alps itself, and covers different mountain ranges in the EU, not only the Alps.[11]

6 Article 2(1) of the Habitats Directive.

7 Article 12(1)(a) of the Habitats Directive.

8 It is worth noting that wolves are also listed in Annex II to the Habitats Directive, as animals of Community interest whose conservation requires, under Article 4 thereof, designation of the special areas of conservation ('SACs'), as part of the Natura 2000 network. For the maintenance or achievement of the favourable conservation status of wolves present in SACs, the Member States must adopt specific conservation measures (Article 6 of the Habitats Directive). For a more detailed description of the Natura 2000 network and the requirements which the Habitats Directive imposes on Member States in relation to SACs, see my Opinion in *Commission* v *Ireland (Protection of special areas of conservation)* (C-444/21, EU:C:2023:90). However, the Member States' obligation to include wolves within the remit of the rules on strict protection under Article 12 of the Habitats Directive is not limited to SACs, but applies to the entirety of their territories.

9 That concerns the Greek populations north of the 39th parallel; Estonian populations, Spanish populations north of the Duero; Bulgarian, Latvian, Lithuanian, Polish, Slovak populations and 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. The Member States (or part of the Member States' territories) that are exempted in respect of wolves from Annex IV to the Habitats Directive are included in Annex V thereto. Animals listed in that annex enjoy a less stringent level of protection under Article 14 of the Habitats Directive.

10 See https://www.eea.europa.eu/data-and-maps/figures/biogeographical-regions-in-europe-2.

11 That biogeographical region includes the Apennines (spine of Italy), the Pyrenees (border between Spain and France), the Scandinavian Mountains (which straddle Sweden, Finland and Norway), the Carpathians (from Slovakia to Romania), the Balkan Mountains, the Rhodope Mountains (Bulgaria), and the Dinaric Alps (including parts of Slovenia and Croatia).

27. The wolf at issue, wolf 158MATK, is a member of a subpopulation of wolves whose natural range is within the area of Alps. According to the data submitted by the Austrian Government in the present case, [12] in 2022, 57 wolves in total were spotted in the entire of Austria. In the Austrian part of the Alps region, there are only two packs, whereas it is estimated that for the sustainability of the Alps subpopulation of wolves, at least 39 packs should exist in Austria. [13] Therefore, the conservation status of wolves in Austria cannot currently be estimated as favourable.

28. The present case raises questions relating to the strict protection of one wolf specimen which is required to be protected by Austria under Article 12 of the Habitats Directive and the possibility to derogate from such strict protection under Article 16 thereof.

29. The referring court submitted two types of questions to the Court. By its first question, it doubts the validity of the strict protection required for wolves as a species, based on the combination of Article 12 of, and Annex IV to, the Habitats Directive. The possible reason for invalidity raised by the referring court is the unequal treatment of Member States, contrary to Article 4(2) TEU. By its remaining questions, the referring court asks for the interpretation of either the general conditions for application of Article 16(1) of the Habitats Directive or of Article 16(1)(b) thereof.

30. In this Opinion, I will first deal with the question of validity (Section C).

31. I will then move to the questions relating to the interpretation of Article 16(1) of the Habitats Directive (Section D). First, I will propose the answer as to whether the situation of wolves in other countries can or must be taken into consideration by a body assessing the fulfilment of requirements for granting a derogation under Article 16(1) of the Habitats Directive (Subsection 1). Then, I will interpret the notion of serious damage which justifies derogation from the strict protection, set out in Article 16(1)(b) of the Habitats Directive, in order to answer which types of damage can be taken into consideration to assess whether a given damage is serious (Subsection 2). Finally, I will look into how it should be assessed whether a satisfactory alternative to the proposed derogatory measure exists and whether economic considerations may be taken into account in such an appraisal (Subsection 3).

C. The validity of Article 12 read in conjunction with Annex IV of the Habitats Directive (the first question)

32. By its first question, the referring court asks in essence whether Article 12(1) of the Habitats Directive, read together with Annex IV thereto, should be considered invalid as it is in breach of the principle of equality between Member States, as enshrined in Article 4(2) TEU. The inequality, it is suggested, exists because Annex IV exempts certain wolf populations situated in the territory of other Member States from the system of strict protection established by Article 12 of that directive, but does not exempt the wolf population in Austria.

[12] Austria did not submit any data on the conservation status of wolves in its territory in the last reporting period from 2013 to 2018 on the basis of Article 17 of the Habitats Directive.

[13] See, in that respect, Large Carnivore Initiative for Europe, 'Assessment of the conservation status of the Wolf (*Canis lupus*) in Europe', Council of Europe, 2022, p. 17, which the Austrian Government quoted in its submission.

33. Nine Member States are exempted from the strict protection of wolves. Spain and Greece were partially excluded from Annex IV to the Habitats Directive at the time of the adoption of that directive.[14] Seven other Member States negotiated their exemptions at the moment of their accession to the European Union.[15] Since the 2007 enlargement, Annex IV to the Habitats Directive has not been amended in respect of wolves.[16]

34. Austria, not having been exempted from Annex IV, is thus subject to the strict protection of wolves in the entirety of its territory.

35. When Austria acceded to the European Union, it did not ask for an exclusion from Annex IV in respect of wolves. That is not surprising because, at that time, as pointed out by the Provincial Government of Tyrol and the Austrian Government, there were no wolves in Tyrol or in Austria. However, the wolves started to return, which, as demonstrated by the present case, sometimes collides with the interests and habits of agricultural populations breeding livestock in the Alps.

36. In such circumstances, is Austria in an unequal position in comparison with those Member States that benefit from the exemption provided for in Annex IV?

1. Admissibility

37. Before entering into the merits of such a claim, it is first necessary to shortly address the question of admissibility of the first question, which was debated at the hearing.

38. The applicant NGOs consider that the answer to the first question would have no impact on the dispute in the main proceedings. The Council also considers the question inadmissible. In its view, the dispute in the main proceedings concerns Article 16 of the Habitats Directive, rather than Article 12 thereof, thus making the latter provision inapplicable to the dispute in the main proceedings.

39. In contrast, the Provincial Government of Tyrol, the Austrian, Finnish and Swedish Governments, as well as the Commission argued in favour of the admissibility of the first question.

40. In particular, the Austrian Government claimed that a possible finding of the Court that Article 12 read together with Annex IV to the Habitats Directive is invalid would certainly have an impact on the dispute before the national court, as that provision would then not be applicable.

41. I agree with the Austrian Government on this point. The first question is, therefore, admissible.

2. Arguments relating to the breach of equality

42. Article 4(2) TEU states that 'the Union shall respect the equality of Member States before the Treaties […]'.

[14] Spain is exempted in relation to its population of wolves north of the Duero and Greece for its population north of the 39th parallel.

[15] That concerns the entirety of the Bulgarian, Estonian, Latvian, Lithuanian, Polish and Slovakian populations of wolves and the Finnish population within the reindeer management area.

[16] See, in that respect, Council Directive 2013/17/EU of 13 May 2013 adapting certain directives in the field of environment, by reason of the accession of the Republic of Croatia (OJ L 158, 10.6.2013. p. 193).

43. The case-law relating to the requirement of equality when applied to Member States is scarce. [17]

44. In my view, the equality of Member States under EU law should be understood as a specific expression of the general principle of equal treatment, which requires that comparable situations must not be treated differently and different situations must not be treated alike unless such treatment is objectively justified. [18]

45. In the area of environmental policy, Article 191(3) TFEU requires, as pointed out by the Commission, that the European Union takes into consideration different environmental aspects in various EU regions. Therefore, achieving the goals of EU environmental policy requires treatment of each Member State which is appropriate for its specific situation. [19]

46. Nevertheless, if two Member States find themselves in a similar situation, but are treated differently, this would result in a breach of the principle of equality. [20]

47. The exclusions provided for in Annex IV to the Habitats Directive reflect the specific situation in each of the exempted Member States. [21] In addition, in most cases, as explained in point 33 of this Opinion, exemptions are the result of accession negotiations. [22]

48. The finding of unequal treatment requires that a Member State is in a comparable situation with another Member State but is treated differently.

49. Yet, neither the Austrian Government nor the Provincial Government of Tyrol have provided any evidence as to why the Court should consider Austria to be in a comparable situation to another Member State exempted from Annex IV. The only argument they offered is that the wolves started to return to Austria, which, after all, is one of the aims of the Habitats Directive.

50. Therefore, I do not find that in the present case any unequal treatment of Austria in relation to other Member States has been established.

[17] In the recent judgment of 21 December 2021, *Euro Box Promotion and Others* (C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19, EU:C:2021:1034, paragraph 249), the Court explained that respecting the primacy of EU law is important for ensuring equality of Member States before the Treaties as required by Article 4(2) TEU. That case, however, is not relevant for the situation in the present case. In two other recent cases in which Hungary and Poland challenged the validity of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget (OJ 2020 L 433I, p. 1, and corrigendum OJ 2021 L 373, p. 94), the possibility that EU institutions take into consideration the particular situation of each Member State when deciding on releasing EU funding was not found to be problematic in respect of the equality of Member States (judgments of 16 February 2022, *Poland* v *Parliament and Council*, C-157/21, EU:C:2022:98, paragraphs 280 to 310, and of 16 February 2022, *Hungary* v *Parliament and Council*, C-156/21, EU:C:2022:97, paragraphs 310 to 318).

[18] See, by analogy, judgment of 30 April 2019, *Italy* v *Council (Fishing quota for Mediterranean swordfish)* (C-611/17, EU:C:2019:332, paragraph 129 and the case-law cited).

[19] The Court has adopted a similar approach in the area of the internal market from very early on. See, for example, judgment of 17 July 1963, *Italy* v *Commission* (13/63, EU:C:1963:20, paragraph 4).

[20] See, to that effect, judgment of 17 March 2011, *AJD Tuna* (C-221/09, EU:C:2011:153, paragraph 108).

[21] In that respect, I cannot agree with the contention of Austrian Government that granting an exclusion from Annex IV to some States at the moment of their accession to the European Union was enabled in order to place them in an equal position to that enjoyed by Spain and Greece, who were granted such an exemption when the Habitats Directive was adopted. Rather, they negotiated their exemptions for the reasons specific to each of them.

[22] In that respect the Court has held that EU provisions which result from an Act of Accession do not constitute an act of an institution, but are provisions of primary law, which are therefore not open to a review of legality. See, to that effect, judgments of 28 April 1988, *LAISA and CPC España* v *Council* (31/86 and 35/86, EU:C:1988:211, paragraphs 12 and 17), and of 5 October 2016, *F. Hoffmann-La Roche* (C-572/15, EU:C:2016:739, paragraphs 30 and 31).

3. Arguments relating to the breach of Article 19 of the Habitats Directive

51. Another argument of invalidity relating to the strict protection of wolves in Austria, relying on Article 19 of the Habitats Directive rather than the breach of the principle of equality, was raised and should therefore be addressed in this Opinion.

52. Under Article 19 of the Habitats Directive, the Council, on a proposal from the Commission, should adjust annexes to that directive according to the technical and scientific progress. The failure to initiate that process and adjust Annex IV to the current situation in Austria, according to the Austrian Government and the Provincial Government of Tyrol, leads to the invalidity of that annex, which the Court should declare in the present case.

53. It is true that thanks to the Habitats Directive,[23] wolves are indeed returning to Austria. Nowadays, that causes problems for the Alpine livestock breeding, where, it is claimed, efficient measures for the protection of sheep and other livestock from the attack of wolves are difficult, if not impossible. Under such circumstances, does the Commission, as the Austrian Government submits, have the duty to initiate a procedure under Article 19 of the Habitats Directive to exempt Austria from Annex IV?

54. I am not persuaded by that argument.

55. If a species could arguably be removed from the protective annex, their conservation status would need to be favourable. Furthermore, to comply with the precautionary principle, removal of a species from the protective annex could happen once their favourable conservation status is certain (that is to say, not a short-term fluctuation), and there would be reasonable evidence that the factors that caused it to have an unfavourable status no longer apply.[24] On the contrary, as mentioned previously, the conservation status of wolves in Austria is far from favourable (see point 27 of this Opinion). In such circumstances, the Commission might, thus, simply not have found good reason to start the procedure set out by Article 19 of the Habitats Directive and to remove Austria from Annex IV thereto.

56. Furthermore, as submitted by the Commission and the Council, neither the European Union nor Austria have entered, in relation to wolves in Austria, a reservation to Annex II of the Bern Convention,[25] under which wolves are subject to strict protection. Given that the European Union is a party to that convention,[26] exempting Austria from Annex IV to the Habitats Directive could result in a breach of the EU's obligations under international law.

57. I, therefore, consider that, under the current circumstances, Austria, or part of its territory, cannot be excluded from Annex IV to the Habitats Directive.

58. However, if a Member State considers that the Commission had a duty to initiate a procedure for the amendment of the Annex IV to the Habitats Directive, but has failed to do so, it has at its disposal a remedy provided for by the Treaty – an action for declaration of failure to act, set out in Article 265 TFEU. However, Austria has not initiated that procedure.

[23] Chapon, G., Epstein, Y., Ouro-Ortmark, M., Helmius, L., Ramirez Loza, J.P., Bétaille, J., López-Bao, J.V., 'European Commission may gut the wolf protection', *Science*, 20 October 2023, Vol. 382, p. 275 and the references mentioned.

[24] Milieu, IEEP and ICF, *Evaluation Study to support the Fitness Check of the Birds and Habitats Directives*, 2016, p. 334.

[25] Bern Convention on the Conservation of European Wildlife and Natural Habitats, adopted on 19 September 1979, and which entered into force on 6 June 1982. Such a reservation can be entered on the basis of Article 22 of that convention.

[26] Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats (OJ 1982 L 38, p. 1).

59. The case-law already explained that a national court cannot ask for the Court to rule, in a preliminary ruling procedure, that an institution has failed to act. [27]

60. Therefore, the possible failure of the Commission to initiate the amendment of Annex IV to the Habitats Directive in respect of Austria on the basis of Article 19 of that directive cannot be a reason for finding the invalidity of that annex in the context of the preliminary ruling procedure.

61. There might be reason to rethink the modalities of cohabitation between people and large carnivores. [28] However, the Court is not the proper forum for that. That type of question should be addressed in a legislative process and the Commission seems to have taken the first step in that direction. [29]

62. The legislative choice expressed in the Habitats Directive as it is in force at the present moment enjoins Austria to uphold the obligations requiring the strict protection of the wolf population in the entirety of its territory. It is not within the Court's competence to rewrite legal provisions, including Annexes such as those forming a part of the Habitats Directive, or to circumvent existing procedures, such as the one provided for by Article 19.

63. I, therefore, propose that the Court answer the first question as follows: Exempting certain Member States from Annex IV to the Habitats Directive does not amount in itself to unequal treatment of a Member State that has not been given such an exemption. The present case has disclosed no factor such as to affect the validity of Article 12(1) of the Habitats Directive, read in conjunction with Annex IV thereto, due to a breach of Article 4(2) TEU.

D. Interpretation of Article 16 of the Habitats Directive

64. By its second, third and fourth questions, the referring court asked for clarification of Article 16 of the Habitats Directive.

65. That provision establishes conditions under which the Member States can derogate from the strict protection of wolves required by Article 12 thereof. [30]

66. Article 16 of the Habitats Directive constitutes an exception to the system of protection established by that act. It therefore must be interpreted restrictively. The Court has also held that proving that the conditions of that provision are fulfilled falls on the national authority allowing for such a derogation. [31]

67. I will assess the remaining questions of the referring court in light of the above.

[27] Judgment of 26 November 1996, *T. Port* (C-68/95, EU:C:1996:452, paragraph 53).

[28] In respect of cohabitation and the questions that it raises, see Nochy, A., *La bête qui mangeait le monde*, 2018, (Arthaud, Paris), and De Witte, F. 'Where the Wild Things are: Animal Autonomy in EU Law', *CMLR*, 2023, pp. 391 to 430.

[29] Commission press release of 4 September 2023, 'Wolves in Europe: Commission urges local authorities to make full use of existing derogations and collects data for conservation status review'. See also https://www.politico.eu/article/ursula-von-der-leyen-wolf-attack-protection-conservation-farming-livestock-animal-welfare-germany/ (last consulted on 11 October 2023). That has led some NGOs to express deep concerns about the misleading information that that communication spreads regarding wolves in Europe, available at: https://www.wwf.eu/?11704941/Open-letter-to-Commission-President-von-der-Leyen-on-protection-status-of-wolves (last accessed on 21 November 2023).

[30] Article 16 of the Habitats Directive also governs derogations from the regime governing less strict protection provided for under Article 14 thereof.

[31] See, judgments of 10 October 2019, *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:851, '*LSL Tapiola*', paragraph 30), and of 11 June 2020, *Alianța pentru combaterea abuzurilor* (C-88/19, EU:C:2020:458, paragraph 25).

1. The territorial scope of the assessment of the state of conservation of a species in a natural range under Article 16(1) of the Habitats Directive (the second question)

68. The second question of the referring court requires an interpretation of the overarching condition set out by Article 16 of the Habitats Directive to allow for a derogation, according to which derogatory measures are possible only if they are not detrimental to the maintenance of the population of wolves at a favourable conservation status in their natural range. The referring court wishes to ascertain whether, when assessing the fulfilment of that condition, it has to take into consideration only the territory of the Member State concerned or the larger cross-border region in which the given population of wolves live, in this case the Alps region (see point 26 of this Opinion).

69. In *LSL Tapiola*, the Court explained that the national authority granting a derogation must carry out a two-step assessment.[32] The first step is to establish the conservation status of a species, and the second step is to assess how the derogation will affect the conservation status of that species.[33]

70. In principle, the derogation may be allowed only if the conservation status of a species (established at step one) is favourable.[34] However, the Court also recognised that exceptionally, the derogation may be granted even if the conservation status of a species is not favourable, where it is duly established that that derogation is not such as to worsen such unfavourable status or to prevent the restoration of a species at a favourable conservation status.[35] Thus, exceptionally, the competent authority can proceed to the second step even if, at the first step, it did not find that the conservation status of a species is favourable.

71. The question asked by the referring court about the territory that is to be taken into consideration for assessing the possibility of derogatory measures seems relevant to me for each of the two steps separately.

72. In relation to the first step, the Provincial Government of Tyrol and the Austrian and Finnish Governments argue that the territories of third countries, such as Switzerland and Liechtenstein, should be taken into account to ascertain the status of conservation of wolves in the Alps region. Taking into account the entire natural range of the subpopulation of wolves at issue, which includes the population in those two countries, the conservation status of that subpopulation would be favourable. Such a finding would lead to the conclusion that it does not matter that in Austria, taken in isolation, that status is not favourable.

73. In *LSL Tapiola*, the Court has, to my understanding, explained that even if a cross-border territory should also preferably be taken into account, the conclusion concerning favourable status cannot be reached without establishing such status on the national territory.[36] In other words, the favourable status has to exist first and inevitably at the national level. If a favourable status exists at the national level, unfavourable status on the larger cross-border level might still

[32] *LSL Tapiola*, paragraph 61.

[33] Such a two-step test is also proposed by the Commission, see European Commission, *Guidance document on the strict protection of animal species of Community interest under the Habitats Directive*, C/2021/7301 final ('the Guidance document', point 3-63).

[34] In *LSL Tapiola*, paragraph 55, the Court held: 'The favourable conservation status of those populations in their natural range is a necessary precondition in order for the derogations for which Article 16(1) provides to be granted.'

[35] Judgment of 14 June 2007, *Commission* v *Finland* (C-342/05, EU:C:2007:341, paragraph 29). See also paragraph 68 of *LSL Tapiola*.

[36] *LSL Tapiola*, paragraphs 58 and 61.

put into question the possibility to adopt a derogatory measure. However, conversely, the unfavourable national status cannot be remedied through favourable status at the cross-border level.

74. My reading of that judgment is, thus, not that the Court intended to say, as understood by the referring court, that if the favourable status exists for the species when assessed in its entire natural range, which embraces several countries, it does not matter that the conservation status is still unfavourable in Austria. To my mind, the Court never meant to say that the unfavourable status of the wolves' population in Austria can be remedied by the favourable conservation status when considered in relation to the larger Alps region. [37]

75. A different interpretation could have a negative impact on the efforts made by Member States to adopt adequate measures to improve the conservation status of a species on their territory. It could have the effect of hiding an unfavourable status in a Member State and giving the false impression that the conservation of a species is secured.

76. Additionally, as the Commission pointed out at the hearing, the national level is the only level at which Member States have reliable data. [38] The Commission admitted that in an ideal situation, a state of conservation of a species would have to be assessed at its natural geographical range, however, that does not yet seem possible. That is the additional reason as to why the favourable status must apply at a local and national level in the first place, before assessing the situation on a larger level.

77. Thus, only after the national scale of assessment has delivered a favourable conservation status can the perspective of assessment zoom out.

78. The purpose of taking into consideration the conservation status at a cross-border level is to prevent a Member State from derogating even if the status of a species is favourable in its territory. In that respect, whether a third country is party to the Bern Convention or not should not play a role. The interest of the Habitats Directive is to preserve biodiversity, which is also dependent on the state of nature in third countries, and whether they are committed to a high level of protection of nature or not. Therefore, unfavourable status of a species in a third country might influence a decision (not) to take the derogation measure despite there being a favourable national conservation status. In that circumstance, I do not see why the data from Switzerland and Liechtenstein would not be taken into account for such a purpose, if the national authorities have access to them.

79. Given that the data submitted to the Court do not suggest that the conservation of wolves in Austria is at a favourable level (see point 27 of this Opinion), it is possible to proceed to the second step only under the exception introduced in the *Commission* v *Finland*, and restated in *LSL Tapiola* (see point 69 of this Opinion). That exception permits a Member State to derogate from the strict protection of wolves although the conservation status of wolves in that state is unfavourable, if such a measure cannot alter the status of conservation, that is, if the measure is neutral in relation to the wolves' population.

[37] In that respect, it is also necessary to notice that no data showing favourable status of wolves in the Alps were submitted to the Court.

[38] That might not even be the case. The NGOs participating in the case submitted that the communication of data between *Länder* in Austria can be problematic.

80. When applying that exception, it is necessary to answer, at the second step, which territory should be taken into consideration in order to conclude whether *the impact* of the derogation would not worsen a status that is already unfavourable or whether it would prevent the restoration of a species at a favourable conservation status in future.

81. Some guidance on that question was already given by the Court in *LSL Tapiola*. Relying on the Opinion of Advocate General Saugmandsgaard Øe,[39] the Court explained that the assessment of the impact of a derogation at the level of the territory of a local population is generally necessary in order to determine its impact on the conservation status of the population concerned on a larger scale.[40]

82. Therefore, it is again necessary to firstly assess the impact of the culling of a singular wolf for the local Alpine population in Tyrol. Adopting a derogation measure is possible only if this results in a finding that such a measure is neutral in comparison to the status of the wolf population in the Austrian Alps.

83. Is that sufficient? Or, is it still necessary to assess, as much as this is possible, the impact that such a measure would have on the subpopulation to which that wolf belongs in its entire natural cross-border range? After all, derogations in one jurisdiction can be detrimental to the same species in a neighbouring jurisdiction.[41]

84. The answer to that question must take into consideration the current reality in which reliable information about the status of wolves in other countries cannot yet be gathered. In those circumstances, I am of the opinion that an obligation can be imposed on national authorities only when assessing the impact of derogatory measure on the local/national population.

85. However, if those authorities possess data from which they can conclude that the proposed measure might add to the deterioration of the conservation status of the subpopulation in another country or in general, even if it would be neutral for the local conservation status, they cannot ignore such data but must take that data into consideration and reject the derogatory measure.

86. In the present case, if the available data revealed that culling wolf 158MATK would not cause any impact on the population in Austria (because that wolf was, for example, only passing through), but could have a negative impact for a pack that lives cross-border, such knowledge should prevent the adoption of the derogatory measure.

87. I, therefore, propose that the Court reply that Article 16(1) of the Habitats Directive must be interpreted as requiring that the assessment whether a species is at a favourable conservation status and whether derogation measures negatively impact the possibility to achieve or maintain favourable conservation status, has to be undertaken on the basis of a local and national territory, even if the natural range of the population at issue encompasses a larger, cross-border biogeographical region. However, if those authorities possess data from which they can conclude that the proposed measure might deteriorate the conservation status of the subpopulation in

[39] Opinion in *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:394, point 83).

[40] *LSL Tapiola*, paragraph 59.

[41] See, Linell, J.D.C., Boitani, L., 'Building biological realism into wolf management policy: the development of the population approach in Europe', *Hystrix, Ital J Mammal*, 2012, pp. 80 to 91, and the examples provided between Poland and Ukraine, as well as Sweden and Norway.

another country or in general, even if it would be neutral for the local conservation status, they cannot ignore such data, but must take that data into consideration and reject the derogatory measure.

2. Does serious damage also include indirect damage to the economy? (the third question)

88. By its third question, the referring court asks, in essence, whether the notion of serious damage in Article 16(1)(b) of the Habitats Directive includes future damage, which cannot be attributed to the specimen who is the subject of a derogation.

89. It should be recalled at the outset that a derogatory measure can only be adopted in order to fulfil one or more objectives provided for in Article 16(1)(a) to (e). The measure at issue in the present case was adopted to prevent serious damage as envisaged by letter (b).

90. Article 16(1)(b) of the Habitats Directive allows for derogations in order 'to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property'.

91. It is, therefore, in the context of that objective that the question as to whether serious damage also encompasses future damage, which cannot be attributed to a particular specimen, should be answered.

92. The case-law already explained that the damage in the sense of the letter (b) could be future damage, as that provision aims at *preventing* damage.[42] That future damage cannot, however, be purely hypothetical. I thus agree with the Commission that the mere possibility that damage may occur does not suffice. Rather, the likelihood that damage may occur must be high.[43] Therefore, 'serious damage' under Article 16(1)(b) of the Habitats Directive includes future damage, the occurrence of which is highly likely.

93. In the present case, in which it was established that wolf 158MATK has already attacked and killed or harmed sheep on the Alpine pastures on two separate occasions, one may accept that it is highly likely that this would happen again.[44] The 158MATK ordinance, which provides that that specimen constitutes an immediate and significant threat to grazing animals, seems to take such a position.

94. Only highly likely future damage can be taken into consideration to assess whether the damage at issue is serious. The referring court wonders what type of future damage can be taken into account in order to conclude whether damage is serious. That court mentioned in the order for reference three separate types of damage, the first being that the direct or indirect material damage caused by the depredation of a particular wolf (lost sheep, cost of organising premature descent from mountain pastures, or increase in the cost of feeding animals after descent). There is no doubt that such damage is to be taken into consideration.

95. The second type of damage mentioned is the non-material damage attributable to the attacks of a particular wolf, suffered by the farmers who no longer enjoy raising sheep or experience psychological stress. As pointed out by the Commission, the wording of the provision under (b)

[42] See, to that effect, judgment of 14 June 2007, *Commission* v *Finland* (C-342/05, EU:C:2007:341, point 40).

[43] See Guidance document, point 3-24.

[44] According to one study, there was approximately a 55 times higher risk for a repeat predation in farms where a wolf has already attacked, compared to any other farm in the same area; see Karlsson, J., and Johansson, Ö., 'Predictability of repeated carnivore attacks on livestock favours reactive use of mitigation measures', *Journal of Applied Ecology*, 2010, Vol. 47, pp.166 to 171.

allows for the inclusion of such damage. The main purpose of that provision is to prevent serious damage. Damage to livestock or property mentioned in the remainder of that sentence is only illustrative. Prevention of other types of damage, such as non-material damage is, thus, not excluded. However, that damage has to be a consequence of the attacks by a particular wolf that is subject to the derogation measures at issue.

96. The referring court seems to be mostly concerned with the third type of damage, that is, future indirect damage to the economy. It mentions long-term macroeconomic developments resulting from possible disappearance of Alpine pasturing, which can have consequences for leisure activities or tourism.

97. As pointed out by the Commission, such consequences cannot be deemed highly likely (it is far from certain that Alpine pasturing will be abandoned if wolves are present and occasionally attack sheep,[45] or that tourism would decrease rather than increase if there are wolves in the mountains[46]).

98. If those consequences occur, they will most likely be the result of multiple causes and various factors. I find it difficult to imagine that the destiny of Austrian Alpine pasturing lies in the paws of wolf 158MATK.

99. Such indirect long-term macroeconomic developments, not imputable to a particular wolf, cannot, therefore, be taken into consideration within the notion of 'serious damage' as provided for under Article 16(1)(b) of the Habitats Directive to justify the decision to cull one wolf specimen.

100. Such concerns should be addressed in the systemic measures and plans which Member States must adopt in order to comply with Article 12 of the Habitats Directive.[47]

101. In answer to the third question, I propose that the Court interprets the concept of 'serious damage' within the meaning of Article 16(1)(b) of the Habitats Directive, as not covering indirect (future) economic damage which is impossible to attribute to a single wolf.

3. Economic considerations in deciding on the availability of a satisfactory alternative (the fourth question)

102. By its fourth question, the referring court asks whether the existence of 'satisfactory alternatives' within the meaning of Article 16(1) of the Habitats Directive is to be examined solely on the basis of actual feasibility of a measure or whether economic criteria are also relevant.

[45] See, in that respect, Mink, S., Loginova, D., Mann, S., 'Wolves' contribution to structural change in grazing systems among Swiss alpine summer farms: The evidence from causal random forest' *Journal of Agricultural Economics*, 2023, p. 1 to 17 ('the exits of … farmers from farming are weakly correlated, among other factors, with the burden caused by wolves.', p. 3.).

[46] Martin, J.-L., Chamaillé-Jammes, S., and Waller, D.M., 'Deer, wolves, and people: costs, benefits and challenges of living together', *Biol Rev*, 2020, p. 782 to 801. pp. 792.

[47] See, to that effect, judgment of 11 June 2020, *Alianța pentru combaterea abuzurilor* (C-88/19, EU:C:2020:458, paragraph 23 and the case-law cited). The Court explained in that judgment that, in order to comply with Article 12 of the Habitats Directive, the Member States must adopt a comprehensive legislative framework and implement concrete and specific protection measures. They also need to envisage coherent and coordinated measures of a preventive nature.

103. Any assessment of the existence of a satisfactory alternative needs to start by determining the available possibilities for achieving the objective of the derogation. When the deciding authority chooses one of those possibilities, it needs to explain that choice, including why other options were discarded.

104. In the present case, the objective of a derogation is to prevent serious damage which is highly likely to occur from repeated depredations of wolf 158MATK. The Provincial Government of Tyrol decided that the appropriate measure is to allow for the culling of that specimen, whereas other available measures are unsatisfactory. By its fourth question, the referring court in essence wishes to know whether economic costs can be a reason for discarding other technically possible options.

105. In my view, the economic costs of the technically available measure can be taken into account as one of the elements in assessing whether such a measure is a *satisfactory* alternative. One may reach that conclusion from the text and the system of the Habitats Directive. For example, Article 16(1)(b) thereof, at issue in this case, allows for economic concerns to be taken into consideration, as it allows for derogations in order to prevent serious damage. Article 2(3) of the Habitats Directive also provides that 'measures taken pursuant to this Directive shall take account of *economic*, social and cultural requirements and regional and local characteristics'. [48]

106. Nevertheless, even if economic concerns can be taken into consideration, alternative measures cannot be rejected from the outset on the grounds that they would cost too much. [49]

107. The proportionality review undertaken to justify chosen solution must be a balancing *stricto sensu*, [50] which requires a weighing of all relevant interests at issue: those of livestock breeders and those expressed in the Habitats Directive to preserve diversity through, among others, the strict protection of certain species.

108. In that sense, it is necessary to recall that under the Habitats Directive, and more specifically under Article 12, Member States have an obligation to develop preventive programmes that will enable protected species to achieve a favourable conservation status (see point 100 of this Opinion). If economic costs of breeding livestock guarding dogs ('LGDs'), or educating shepherds are assessed in the context of each individual decision relating to a danger posed by a single specimen, they will always be estimated as too costly. [51] To the contrary, if they are part of a preventive national plan, the conclusion might be different. Therefore, the economic costs as part of the assessment of the availability of satisfactory alternative must be placed in the context of Member States' obligations to put in place measures and plans necessary for the strict protection of wolves.

109. The Expert Report on which the contested decision is based concluded that three alternatives that were taken into consideration – raising fences, using LGDs, or having shepherds accompanying the herds are not reasonably and proportionally available. [52] That conclusion was

[48] Emphasis added.

[49] In that respect, see Guidance document, point 3-56.

[50] Opinion of Advocate General Kokott in *Commission* v *Finland* (C-342/05, EU:C:2006:752, points 24 and 27).

[51] See Large Carnivores, Wild Ungulates and Society Working Group (WISO) of the Alpine Convention and the project Life Wolfalps EU, *Prevention of damages caused by large carnivores in the Alps*, 2020, p. 20 (describing that there is no official program for breeding LGDs in Austria, and that farmers have to find them themselves; indicating that 'many shepherds don't know how to work with LGDs').

[52] It might also be added that other possible measures mentioned by the applicants in the main proceedings, such as night shelters for sheep, or transmitters attached to the wolf, were not discussed at all.

reached on the basis of the general rules [53] which had determined in advance which types of pastures could not reasonably be protected, not only because it was technically impossible, but also because it was assessed as too costly. [54] The Expert Report examined 61 pastures at which wolf 158MATK was considered to present a danger to livestock, and found that all of them display at least one criterion as to why it was not reasonable to use those measures of protection of herds. At the same time, the contested decision did not place such a conclusion in the context of any plans of either the Provincial Government of Tyrol or the Austrian Government, which were adopted to address the problem of protecting livestock in Alpine pastures from wolf attacks.

110. Lack of any plans for the management of the new situation resulting from the return of the wolves, together with the general criteria established in advance concerning pastures that cannot benefit from the measures for the protection of livestock, result in the possibility to defend every decision allowing for the culling of a lone wolf as a result of no availability of an economically reasonable alternative. It is a blanket licence to kill any wolf appearing in the area before them having been formally declared as an exception to the regime of strict protection applicable to wolves in general.

111. That was not the intention of Article 16(1) of the Habitats Directive. The derogations provided for are exceptional measures, and should not become an instrument for preventing the presence of wolves in certain areas. Cohabitating with wolves demands some adjustments and related costs must also be borne on the part of the Alpine breeders. [55] Such inevitable costs cannot be ignored in the assessment of proportionality of alternative measures.

112. The Court has already held that Article 16(1)(b) of the Habitats Directive does not permit the authorities to derogate from the prohibitions laid down in Article 12 of that directive on the sole ground that compliance with those prohibitions entails a change in agricultural, forestry or fish farming activities. [56] Those changes are not cost-free. Therefore, some costs of enabling the return of wolves have to be accepted as intrinsic to the goals of the Habitats Directive. They are part of, what the Austrian Government called at the hearing, a process of relearning how to live with wolves.

113. In the present case, for example, costs of descending herds earlier in a single year might not be sufficient to conclude that that is not a satisfactory alternative measure. Organising protection, by erecting fences where possible or training LGDs and possibly pooling them for more herds [57] takes time and might not be available in the year when a lone wolf passes through certain Alpine

[53] In that regard, it seems that the contested decision is based on the 2021 Working Group Recommendations for the Federal Provinces as to when herd protection measures for protection against large carnivores, such as wolves, are satisfactory. It contains a set of criteria for the 'designation of Alpine pasture protection areas' (relating to slope of pastures, presence of roads or watercourses, geometry of the filed, number of livestock, etc.). If only one of the pastures in the area visited by the wolf at issue, does not satisfy the criteria of protection thus determined, it is automatically considered that a satisfactory alternative to protect herds does not exist.

[54] For example, one of the criteria relied on was that herding the livestock at issue with LGDs is not reasonable and proportionate if the herd count is less than 500 sheep or goats.

[55] On that necessity of adaption, in the context of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), repealed by Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; 'the Birds Directive'), the Birds Directive includes, in its Article 9(1), a standard of 'no other satisfactory solution' analogous to the 'no satisfactory alternative' of the Article 16(1) of the Habitats Directive; see judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux* (C-900/19, EU:C:2021:211, paragraph 43 and the case-law cited).

[56] See, to that effect, judgment of 15 March 2012, *Commission* v *Poland* (C-46/11, EU:C:2012:146, paragraphs 31, 42 and 49).

[57] In that respect, some concrete projects in the Province of Tyrol already enabled pooling of resources to enable protection of livestock. In 2021, 850 sheep from 35 farmers were herded from several communities. The flock of sheep is continuously guarded by two shepherds, with three LGDs also on duty, available at https://tirol.orf.at/stories/3111539/.

pastures. However, such measures might be in place for the following Alpine pasture year, if the plans existed for the introduction of such measures. The costs of such measures might even be mitigated through different public sources of financing, including at the EU level. [58]

114. Thus, the economic costs of available measures cannot be assessed in isolation of preventive plans necessary for enabling strict protection under Article 12 of the Habitats Directive. The authority allowing for a derogation must clearly explain in which way the economic factors influenced the decision that other measures are not a satisfactory alternative, placing its decision in the wider context of the obligations which Member States have under the Habitats Directive.

115. In *Commission* v *Finland*, the Court considered that 'such decisions … 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'. [59] It is for the referring court to establish whether the contested decision clearly explained in which way the economic factors influenced its finding concerning the lack of a satisfactory alternative to culling a wolf.

116. I, therefore, propose that the Court answers the fourth question in the following way: the assessment of the availability of a satisfactory alternative can take into consideration economic costs of alternative measures. In assessing the impact of economic costs of available measures, all participating interests must be balanced. Appreciation of the influence of economic factors on the conclusion that a satisfactory alternative does not exist must take into consideration that some costs and adjustments are inevitable if the goals of that directive are to be achieved. The assessment must be conducted on a case-by-case basis and cannot be based on criteria set generally and in advance and it must be placed in the wider context of a Member State's measures and plans for enabling the strict protection of wolves.

IV. Conclusion

117. In the light of the foregoing, I propose that the Court of Justice answer the questions referred by the Landesverwaltungsgericht Tirol (Regional Administrative Court, Tyrol, Austria) as follows:

(1) Exempting of certain Member States from Annex IV to Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora does not amount in itself to unequal treatment of a Member State that is not given such an exemption. The present case has disclosed no factor such as to affect the validity of Article 12(1) of Directive 92/43, read in conjunction with Annex IV thereto, due to a breach of Article 4(2) TEU.

(2) Article 16(1) of Directive 92/43 must be interpreted as requiring that the assessment whether a species is at a favourable conservation status and whether derogation measures negatively impact the possibility to achieve or maintain a favourable conservation status, has to be undertaken on the basis of local and national territory, even if the natural range of the population at issue encompasses a larger, cross-border biogeographical region. However, if those authorities possess data from which they can conclude that the proposed measure

[58] Such as the European agricultural fund for rural development (EAFRD) or Life Wolfalps EU; more information available at https://www.lifewolfalps.eu/.

[59] Judgment of 14 June 2007, *Commission* v *Finland* (C-342/05, EU:C:2007:341, paragraph 31). See also Opinion of Advocate General Saugmandsgaard Øe in *Luonnonsuojeluyhdistys Tapiola* (C-674/17, EU:C:2019:394, point 70).

might deteriorate the conservation status of the subpopulation in another country or in general, even if it would be neutral for the local conservation status, they cannot ignore such data, but must take that data into consideration and reject the derogatory measure.

(3) The concept of 'serious damage', as referred to in Article 16(1)(b) of Directive 92/43, must be interpreted as not covering indirect (future) economic damage which is impossible to attribute to a single wolf.

(4) The assessment of the availability of a satisfactory alternative, required by Article 16(1) of Directive 92/43, can take into consideration economic costs of alternative measures. In assessing the impact of economic costs of available measures, all participating interests must be balanced. Appreciation of the influence of economic factors on the conclusion that a satisfactory alternative does not exist must take into consideration that some costs and adjustments are inevitable if the goals of that directive are to be achieved. The assessment must be conducted on a case-by-case basis and cannot be based on criteria set generally and in advance and it must be placed in the wider context of a Member State's measures and plans for enabling the strict protection of wolves.