

## Mountain hare culls and the law

### Prohibition of means of killing hares

Mountain Hares are protected under Annex V of the EU Habitats Directive. This stipulates in Article 15 that they may be killed but that Member States must “prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations, ... in particular, the use of the means ... listed in Annex VIa”. However, the list of proscribed methods of killing (Annex VIa) should not be considered as exhaustive and any other “indiscriminate means capable of causing local disappearance” is also prohibited. The EU Habitats Directive is transcribed into law in Scotland by the Conservation (Natural Habitats etc.) Regulations 1994. The original Regulations were inadequate to capture all of the provisions of Article 15 but this was corrected by an amendment made in 2007

The wording of the regulation implies that the means of killing have to be **both** indiscriminate **and** “capable of causing local disappearance...”. The term “indiscriminate” is undefined but the examples given in Annex VIa also contain the term “non-selective”. They include both methods of killing that are likely to kill non-target species (e.g. gassing, poisons) but also methods that would kill only the target species but would be incapable of selecting a particular age class or sex. They also include “Semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition” which implies that killing large numbers of individuals simultaneously is to be avoided. The definition of “Indiscriminate” therefore depends on what it is one is trying to discriminate and why.

The real test is whether it is capable of causing local disappearance. This is a clearly defined outcome and may lie behind the list of illegal methods in Annex VIa – all of them are capable of causing local disappearance. Shooting a single animal with a rifle would be acceptable but shooting many with an automatic weapon would not. Following this reasoning, it might be acceptable to shoot a single hare with a shotgun but sending several marksmen out with shotguns to shoot as many as possible would not. It should be noted that “means” does not solely relate to the weapon or instrument but also to how it is used. For instance, traps can be used provided their “conditions of use” are selective.

Thus, although shooting mountain hares with a shotgun is legal in Europe, it would not be legal if the intensity and duration of the shooting was capable of causing local extermination of, or serious disturbance to, populations.

A further consideration is the type of animal that is listed in Annex V: almost all of them are quarry species (for food or pelts) or animals that are killed recreationally. Apart from Mountain Hares, it includes “Species of Community Interest” such as Salmon, Shad, Grayling, Whitefish, seals, Pine Marten and Polecat. The motivation for including them seems to be regulate the harvest to ensure that they are not depleted in the wild.

In the case of the large-scale culling of Mountain Hares in Scotland, the animals are not being treated as quarry species but more as pests, whose existence poses a disease threat to another wild quarry species, the Red Grouse. They are killed not to take a sustainable harvest (for food or recreation) but to attempt to reduce their population in the locality of a

grouse moor. This intention clearly runs counter to the letter and the intention of Article 15 of the Habitats Directive.

Under Article 16 of the Habitats Directive it is possible for Member States to derogate from Article 15 to allow otherwise illegal means of killing “in the interest of protecting wild fauna and flora and conserving natural habitats” or “to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property” provided there “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”.

It is not clear whether the Scottish Government would be able to derogate from Article 15 in order to allow the reduction of populations of Mountain Hares. To do so, it would need to issue a licence and to prove that there was no satisfactory alternative. No licence has been issued and no assessment of alternatives has ever been publicly carried out.

Furthermore, the possible reasons for derogation, given in Article 16, are more restrictive than those available under Regulation 44. The only reasons relevant to Mountain Hare management in Article 16 are “in the interest of protecting wild fauna and flora and conserving natural habitats” and “to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property”. Regulation 44 paraphrases these and includes an additional “preventing the spread of disease”. It therefore appears to be incompatible with the Habitats Directive.

### **Requirement to maintain Favourable Conservation Status**

By virtue of being included in Annex V, Mountain Hares are defined as being “Species of Community Interest”. Member States are required to undertake surveillance of such species to ensure that they are maintained at or restored to favourable conservation status. If they deem it necessary, they may also take additional measures to “ensure that the taking in the wild .... as well as their exploitation is compatible with their being maintained at a favourable conservation status”.

By Scottish Government's own admission it is has been unable to assess accurately the population of mountain hares and therefore to know whether the species is in Favourable Conservation Status or whether “their exploitation” is compatible with maintaining them in Favourable Conservation Status.

Comparison of Legal provisions relevant to Annex V / Schedule 3 species in the Habitats Directive and the Conservation (Natural Habitats) Regulations

| <b>Habitats Directive</b> (Council directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora) |   | <b>Conservation (Natural Habitats, &amp;c.) Regulations 1994 (as amended in Scotland)</b> |  |
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| Article 2.2  | 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.  |   |  |
| Article 11   | Member States shall undertake surveillance of the conservation status of the natural habitats and species referred to in Article 2 with particular regard to priority natural habitat types and priority species.   | Regulation 111<br>Amended 2012  | (1) The Scottish Ministers must take such steps to encourage research and scientific work as they consider necessary—<br>(a) having regard to the objectives in Article 2, and the obligation in Article 11, of the Habitats Directive; and<br>(b) for the purpose of the protection or management, and in relation to the use, of any population of wild bird.<br>(2) The Scottish Ministers must supply such information as they consider appropriate to the European Commission and, in the case of information supplied for the purposes of the Habitats Directive, to member States, to further the proper co-ordination of research carried out by member States or by the European Commission for the purposes of the Directives. |
| Article 14.1   | If, in the light of the surveillance provided for in Article 11, Member States deem it necessary, they shall take measures to ensure that the taking in the wild of specimens of species of wild fauna and flora listed in Annex V as well as their exploitation is compatible with their being maintained at a favourable conservation status.   |   |  |
| Article 14.2   | Where such measures are deemed necessary, they shall include continuation of the surveillance provided for in Article 11. Such measures may also include in particular:<br>— temporary or local prohibition of the taking of specimens in the wild and exploitation of certain populations,<br>— regulation of the periods and/or methods of taking specimens,<br>— assessment of the effect of the measures adopted.<br>{Etc.} |   |  |

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| Article 15   | <p>In respect of the capture or killing of species of wild fauna listed in Annex V (a) and in cases where, in accordance with Article 16, derogations are applied to the taking, capture or killing of species listed in Annex IV (a), Member States shall prohibit the use of all indiscriminate means capable of causing local disappearance of, or serious disturbance to, populations of such species, and in particular:</p> <p>(a) use of the means of capture and killing listed in Annex VI (a);</p> <p>(b) any form of capture and killing from the modes of transport referred to in Annex VI (b).</p> | <p>Regulation 41(1)<br/>41(2)</p> <p>Includes 2007 ammendment</p> | <p>This regulation applies in relation to the taking or killing of a wild animal— of any of the species listed in Schedule 3 to these Regulations</p> <p>It is an offence to use for the purpose of taking or killing any such wild animal—</p> <p>(a) any of the means listed in paragraph (3) or (4) below,</p> <p>(b) any form of taking or killing from the modes of transport listed in paragraph (5) below, or</p> <p>(c) any other means of taking or killing which is indiscriminate and capable of causing the local disappearance of, or serious disturbance to, a population of any species of animal listed in Schedule 3 to these Regulations or any European protected species of animal.”</p>                                    |
| Article 16.1 | <p>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):</p> <p>(a) in the interest of protecting wild fauna and flora and conserving natural habitats;</p> <p>(b) to prevent serious damage, in particular to crops, livestock, forests, fisheries and water and other types of property;</p>   | Regulation 44(1),(2)  | <p>Regulations 39, 41 and 43 do not apply to anything done for any of the following purposes under and in accordance with the terms of a licence granted by the appropriate authority.</p> <p>(c) conserving wild animals or wild plants or introducing them to particular areas;</p> <p>(e) preserving public health or public safety or other imperative reasons of overriding public interest including those of a social or economic nature and beneficial consequences of primary importance for the environment;</p> <p>(f) preventing the spread of disease; or</p> <p>(g) preventing serious damage to livestock, foodstuffs for livestock, crops, vegetables, fruit, growing timber or any other form of property or to fisheries.</p> |
|              |  | Regulation 44 (3)   | <p>The appropriate authority shall not grant a licence under this regulation unless they are satisfied—</p> <p>(a) that there is no satisfactory alternative, and</p> <p>(b) that the action authorised will not be detrimental to the maintenance of the population of the species concerned at a favourable conservation status in their natural range.</p>   |
|              |  | Regulation 44 (5)<br>Amended 2007                                 | <p>The Scottish Ministers shall from time to time consult with the nature conservation bodies as to the exercise of the Scottish Ministers' functions under this regulation; and they shall not grant a licence of any description unless they have been advised by the appropriate nature conservation body as to the circumstances in which, in the opinion of the appropriate nature conservation body, licences of that description should be granted.</p>  |
| Article 16.2 | <p>Member States shall forward to the Commission every two years a report in accordance with the format established by the Committee on the derogations applied under paragraph 1. The Commission shall give its opinion on these derogations within a</p>   |   |   |

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|          | maximum time limit of 12 months following receipt of the report and shall give an account to the Committee.   |                   |   |
| Annex V  | Animal and plant species of community interest whose taking in the wild and exploitation may be subject to management measures  | Schedule 3        | Animals listed on Annex V of the Habitats and Species Directive whose natural range includes Great Britain  |
| Annex VI | <p>Prohibited methods and means of capture and killing and modes of transport</p> <p>(a) Non-selective means</p> <ul style="list-style-type: none"> <li>— Blind or mutilated animals used as live decoys</li> <li>— Tape recorders</li> <li>— Electrical and electronic devices capable of killing or stunning</li> <li>— Artificial light sources</li> <li>— Mirrors and other dazzling devices</li> <li>— Devices for illuminating targets</li> <li>— Sighting devices for night shooting comprising an electronic image magnifier or image converter</li> <li>— Explosives</li> <li>— Nets which are non-selective according to their principle or their conditions of use</li> <li>— Traps which are non-selective according to their principle or their conditions of use</li> <li>— Crossbows</li> <li>— Poisons and poisoned or anaesthetic bait</li> <li>— Gassing or smoking out</li> <li>— Semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition</li> </ul> | Regulation 41 (3) | <p>The prohibited means of taking or killing of mammals are—</p> <ul style="list-style-type: none"> <li>(a) blind or mutilated animals used as live decoys;</li> <li>(b) tape recorders;</li> <li>(c) electrical and electronic devices capable of killing or stunning;</li> <li>(d) artificial light sources;</li> <li>(e) mirrors and other dazzling devices;</li> <li>(f) devices for illuminating targets;</li> <li>(g) sighting devices for night shooting comprising an electronic image magnifier or image converter;</li> <li>(h) explosives;</li> <li>(i) nets which are non-selective according to their principle or their conditions of use;</li> <li>(j) traps which are non-selective according to their principle or their conditions of use;</li> <li>(k) crossbows;</li> <li>(l) poisons and poisoned or anaesthetic bait;</li> <li>(m) gassing or smoking out;</li> <li>(n) semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition.</li> </ul> |