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OPINION OF ADVOCATE GENERAL
ĆAPETA
delivered on 30 May 2024 ¹

Case C-23/23

European Commission

v

Republic of Malta

(Failure of a Member State to fulfil obligations – Directive 2009/147/EC – Conservation of wild birds – Live-capturing – Derogation regime allowing the capture of finches – Article 9(1)(b) – Research purpose derogation – Requirements – Clear and sufficient statement of reasons – Lack of a satisfactory alternative)

¹ Original language: English.

I. Introduction

1. The falcon is not the only bird for which Malta is renowned.² For centuries, in fact, it has had a tradition of trapping wild finches migrating over its territory.³

2. In the European Union, wild finches are protected by the Birds Directive.⁴ Embracing the immortal line of Sam Spade in *The Maltese Falcon*, ‘I don’t mind a reasonable amount of trouble’, during the accession negotiations, the Republic of Malta accepted to adjust its custom to the requirements of the Birds Directive by 2008.⁵

3. In 2009, Malta therefore banned finch trapping. However, in 2014, it decided to use the derogation provided for under Article 9(1)(c) of the Birds Directive in order to allow the trapping of seven species of wild finches as a recreational activity.⁶

² Huston, J., *The Maltese Falcon*, Warner Bros, 1941. On the historical facts linked to that story, see Falzon, M.-A., *Birds of Passage, Hunting and Conservation in Malta*, Berghahn Books, New York, Oxford, 2020, p. 26.

³ It is my understanding that bird trapping of finches has been in practice in Malta to use those birds as live decoys for hunting or further trapping. The birds were also kept in cages and used for breeding or as pets, or for the pleasure of listening to their vocal abilities. See, in that respect, Falzon, M.-A., *Birds of Passage, Hunting and Conservation in Malta*, op. cit., pp. 14 to 15, 51 and 55 to 56.

⁴ 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Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), which repealed Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1) (‘the Birds Directive’).

⁵ The Accession Treaty provided for the transition period, during which Malta was to gradually phase-out the bird trapping activities prohibited by the Birds Directive. See Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic, concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic to the European Union (OJ 2003 L 236, p. 17, at p. 870).

⁶ The seven species of wild finches at issue are the following: the Chaffinch (*Fringilla coelebs*), the Linnet (*Carduelis cannabina*), the Goldfinch (*Carduelis carduelis*), the Greenfinch (*Carduelis chloris*), the Hawfinch (*Coccothraustes coccothraustes*), the Serin (*Serinus serinus*) and the Siskin (*Carduelis spinus*).

4. In its judgment of 21 June 2018, *Commission v Malta*,⁷ the Court found that that recreational regime failed to meet the conditions for that derogation. Of particular relevance for the present application, the Court considered that the lack of knowledge about the provenance of the reference populations of birds migrating over Malta prevented the satisfaction of the ‘small numbers’ criterion set by the recreational derogation of the Birds Directive (‘the knowledge gap’).⁸

5. Following that judgment, Malta repealed the recreational derogation regime.

6. In October 2020, Malta adopted the ‘Finches Project’.⁹ It provides for the live-capturing of the same seven species of finches as was provided for by the legislation allowing recreational trapping, but the trapping proposed by the Finches Project is envisaged as part of a purported research project. The new legislation which establishes the framework for the Finches Project is based on a different derogation of the Birds Directive, one which, under Article 9(1)(b) thereof, can be relied on for the ‘purposes of research’.

7. The European Commission considers that the Finches Project is only a ‘cover’ to enable the continuation of the same recreational activities of finches trapping, which the Court found to be contrary to the Birds Directive in *Commission v Malta*. The Commission consequently initiated the infringement procedure on the basis of Article 258 TFEU, which resulted in the present action.¹⁰

⁷ Judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, ‘*Commission v Malta*’).

⁸ See *Commission v Malta*, paragraphs 62 to 76 of that judgment. Other reasons why the Court considered that the recreational derogation did not satisfy conditions of Article 9(1)(c) of the Birds Directive were that the clap-nets were not selective methods of capture, that the trapping was very intensive, and that the derogation was not carried out under strictly supervised conditions (see *Commission v Malta*, paragraphs 71, 79, 81, 84, and 97).

⁹ The Finches Project is based on the legislation explained under Section II of the present Opinion.

¹⁰ At the hearing, the Commission explained that it decided to lodge the present action based on Article 258 TFEU, and not on the basis of Article 260(2) TFEU, because the legislation introducing the Finches Project purports to be justified by a different provision of the Birds Directive. Thus, even if, according to the Commission, the new legislation perpetuates the old regime, its reliance on the different derogatory reason, required the initiation of a new infringement proceeding.

II. Legal framework

A. EU law

8. Together with the Habitats Directive,¹¹ the Birds Directive is the EU instrument that aims at the conservation of bio-diversity.¹²

9. As is apparent from recitals 3 and 5 of the Birds Directive, the preservation of bird species diversity is not only an environmental aim in itself, but is also understood as a necessary element to attain the EU's objectives of sustainable development and improved living conditions.

10. Notwithstanding certain differences in the regime applicable to the bird species enumerated in Annexes I to III to the Birds Directive, Article 1(1) thereof makes it clear that its aim is the conservation of 'all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies'.¹³ To that end, the Birds Directive regulates 'the protection, management and control of these species and lays down rules for their exploitation'.

11. Article 5 of the Birds Directive prohibits, among other things, the deliberate killing or capture of birds by any method and deliberate disturbance of birds.

12. Article 8(1) of the Birds Directive additionally provides:

'In respect of the hunting, capture or killing of birds under this Directive, Member States shall prohibit the use of all means, arrangements or methods used for the large-scale or non-selective capture or killing of birds or capable of causing the local disappearance of a species, in particular the use of those listed in Annex IV, point (a).'

¹¹ 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').

¹² About the importance of biodiversity see the introductory remarks to my Opinion in *Commission v Ireland* (Protection of special areas of conservation) (C-444/21, EU:C:2023:90, points 1 to 3).

¹³ [Emphasis added]. It must be outlined that Annex I to the Birds Directive lists the birds which, in accordance with Article 4 thereof, are subject to special conservation measures in order to ensure their survival. Annex II lists the species which may be hunted in accordance with the national legislation, and Annex III lists the species which may be subject of trade under specific conditions. Finches subject to the 'Finches Project' are not listed in any of the annexes to the Birds Directive. However, they are also submitted to special conservation measures on the basis of Article 4(2) of the Birds Directive, which requires such treatment for 'regularly occurring migratory species not listed in Annex I'.

13. The fourth indent of point (a) of Annex IV mentions nets and traps amongst the forbidden means and methods of capture and it follows from *Commission v Malta* that clap-nets, whose use is provided for by the ‘Finches Project’, fall within that provision.¹⁴

14. Even if the Birds Directive in principle prohibits the trapping of birds, the Court has considered that, under certain conditions, the hunting or capture of wild birds for recreational purposes may constitute ‘judicious use’ authorised by that directive.¹⁵ That seems to be in line with Article 2 of the said directive, which allows Member States to take account of economic and recreational requirements when designing measures necessary for the conservation of birds.

15. Nevertheless, as also confirmed by the Court,¹⁶ the preservation of traditional activities does not constitute an autonomous derogation from the system of protection established by the Birds Directive. Rather, any derogation can be authorised only if provided by and falling under the conditions specified in the Birds Directive itself.

16. In that respect, Article 9(1) of the Birds Directive reads as follows:

‘Member States may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution, for the following reasons:

...

- (b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
- (c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.’

¹⁴ See, to that effect, points 79, 81 and 84 of that judgment.

¹⁵ See, to that effect, judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux* (C-900/19, EU:C:2021:211, paragraph 33 and the case-law cited, ‘*One Voice*’).

¹⁶ See, to that effect, judgments of 8 July 1987, *Commission v Belgium* (247/85, EU:C:1987:339, paragraph 8); of 28 February 1991, *Commission v Germany* (C-57/89, EU:C:1991:89, paragraph 22); and of 23 April 2020, *Commission v Finland* (Spring hunting of male common eiders) (C-217/19, EU:C:2020:291, paragraph 85); and *One Voice*, paragraph 35.

B. Maltese law

17. The Republic of Malta established the Finches Project in 2020. The relevant legislation was adopted on the basis of the Wild Birds Regulations,¹⁷ which is the piece of legislation transposing the Birds Directive into Maltese law.

18. Regulation 9 of the Wild Birds Regulations transposes Article 9 of the Birds Directive, fixes the conditions to be used for the assessment of derogations and sets out a specific decision-making procedure involving the Maltese Ornithology Committee, whose role is regulated by Regulation 10 of the Wild Birds Regulations.

19. The Finches Project was established by the Framework Regulations 2020,¹⁸ and implemented that year on the basis of the Declaration 2020.¹⁹ The basic framework was amended in 2021 by the Framework Regulations 2021,²⁰ which were implemented in that year by the Declaration 2021²¹ and in the subsequent year by the Declaration 2022.²²

20. The relevant regulations ‘establish a framework allowing, under strictly supervised conditions and in a selective manner, a research derogation to determine Malta’s reference population [of seven finch species] on the basis of Article 9(1)(b) [of the Birds Directive] ...’.²³ The Framework Regulations 2020 explained further in Regulation 1(2) that the project ‘specifically aim[s] to gather sufficient scientific information in order for Malta to introduce a derogatory regime in terms of Article 9(1)(c) of the Birds Directive that complies with the “small numbers” criterion as interpreted by the Court of Justice in [*Commission v Malta*]’.

21. Under the Finches Project, those data would be collected by capturing the birds belonging to the seven finch species covered by the project with the use of

¹⁷ Legal Notice 79 of 29 March 2006, which contains the Regulations on the preservation of wild birds (Annex A.1 to the application).

¹⁸ Legal Notice 399 of 27 October 2020.

¹⁹ Legal Notice 400 of 2020 concerning a declaration on a derogation allowing a research period for 2020.

²⁰ Legal Notice 394 of 2021.

²¹ Legal Notice 395 of 2021 concerning a declaration on a derogation allowing scientific research for 2021.

²² Legal Notice 257 of 2022 concerning a declaration on a derogation allowing scientific research for 2022.

²³ That is provided in Regulation 1(2) of both the Framework Regulations 2020 and the Framework Regulations 2021. However, the wording ‘under strictly supervised conditions and in a selective manner’ were inserted by the Framework Regulations 2021.

clap-nets with a mesh size of not less than 18 mm by 18 mm. The study design seeks to attain data saturation when the sample size reaches 60 to 70 ring recoveries for each of the seven finch species.

22. The capturing is to be performed by persons in possession of a special licence, called data collectors. The special licence may be issued to a person who is in possession of a general live-capturing licence, submits a site plan locating their approved clap-nets and attends a mandatory course on the research objectives.

23. Upon capturing the bird, a data collector checks whether the captured bird is ringed, and, if so, enters the information from the ring into a recovery form (this is called ‘controlling’). The form is to be returned to the Maltese Wild Birds Regulation Unit (‘the WBRU’). As of the adoption of the Framework Regulations 2021, it is provided that all specimens captured by a data collector are to be immediately reported to the regulatory body (which was already at that relevant time the WBRU), including those specimens not fitted with a ring. After ‘controlling’ the bird, the data collector must immediately release it back into the wild.

24. The relevant regulatory framework also provides for the possibility of the participation of persons with the special ringing licence in the project, whose task it would be to fit the ring with relevant data on the captured birds. However, the organisations active in Malta in bird ringing, EURING and BirdLife Malta, refused to participate in the Finches Project, raising ethical concerns,²⁴ and invited bird ringers not to participate in that project. As bird ringers from the national ringing scheme do not participate in the project, as was explained at the hearing, Malta published a Europe-wide call for the bird ringers before each research season. However, no bird ringers applied. For that reason, the Finches Project consisted exclusively of capturing and controlling birds that were already fitted with a ring.

25. The Finches Project as described was implemented in 2020 to 2022. Every year, between 20 October and 20 December, the implementing declarations opened the research periods during which the trapping of birds was allowed.

III. The pre-litigation procedure

26. On 3 December 2020, the Commission sent Malta a letter of formal notice. It considered the Finches Project inconsistent with Articles 5 and 8(1) of the Birds Directive, and not justified by the derogation provided for in Article 9(1)(b)

²⁴ See, in that respect Regulation 2(c) of the Declaration 2021, explaining that bird ringers from the national ringing scheme cannot and are ethically against the use of live-decoys for the purpose of ringing and control.

thereof. The Commission considered that Malta had failed to establish that the Finches Project pursued a genuine research purpose, that Maltese legislation lacked a statement of reasons on whether there is another satisfactory solution and that it had failed to demonstrate the absence of another satisfactory solution.

27. Malta replied on 3 February 2021 and argued that the Finches Project was justified by Article 9(1)(b) of the Birds Directive. It claimed that the new derogation regime served research purposes. In particular, that research aims at filling the knowledge gap, found by the Court in *Commission v Malta*.

28. On 9 June 2021, the Commission delivered a reasoned opinion with the same grievances as the letter of formal notice. As Malta had already indicated that it would open another trapping season in the autumn of 2021, the reasoned opinion set a short reply period of one month. A request by Malta to extend that deadline was refused.

29. Malta replied to that reasoned opinion on 15 July 2021, maintaining its position that the scheme at issue complied with EU law.

30. Following discussions and meetings between the Commission services and the Maltese authorities, on 14 October 2021, the Maltese Minister for the Environment repealed the Framework Regulations 2020 ‘without prejudice to the validity of anything done or omitted to be done thereunder’.

31. On 19 October 2021, that minister continued the Finches Project by adopting Framework Regulations 2021.²⁵

32. The Commission considers that the Framework Regulations 2020 and the Framework Regulations 2021, as well as the declarations opening research periods in 2020, 2021 and 2022, constitute conduct of the same kind, and thus treats them collectively as one measure.

IV. The procedure before the Court

33. By its application lodged on 20 January 2023, the Commission asks the Court to declare that, by adopting the Finches Project, and thus allowing the live capturing of seven species of wild finches in question, Malta has failed to fulfil its obligations under Articles 5 and 8(1) of the Birds Directive, read in conjunction with Article 9(1) thereof.

34. In its defence lodged on 21 April 2023, Malta requests the Court to dismiss the present action as inadmissible or, in the alternative, as unfounded.

²⁵ With the Declaration 2021, adopted on the same day as the Framework Regulations 2021, Malta opened another research period from 20 October 2021 to 20 December 2021. A similar research period was opened, from 20 October 2022 to 20 December 2022, by the Declaration 2022.

35. The Commission and Malta also lodged a reply and a rejoinder on 19 June 2023 and 24 July 2023, respectively.

36. A hearing was held on 7 March 2024 at which the Commission and Malta presented oral argument.

V. Analysis

37. Before delving into the substance of the present case, I shall first discuss its admissibility.

A. Admissibility

38. Malta claims that the present action is inadmissible inasmuch as it is based on a reasoned opinion which was promptly followed by a substantial amendment of the national legal framework, which the application equates and confuses with the prior framework. As a result, the scope of the present action is unclear and violates Malta's rights of defence.

39. The Commission replies that the reasoned opinion of 9 June 2021 referred to Malta's Finches Project, which, at that time, consisted of the Framework Regulations 2020 and the Declaration 2020. The application challenged the same project, which by then was continued by the Framework Regulations 2021 and the declarations for 2021 and 2022. In the Commission's view, the latter measures are conduct 'of the same kind'.²⁶

40. The Commission claims that the key features of the original Finches Project, which, according to the reasoned opinion, failed to comply with Article 9(1)(b) of the Birds Directive, persisted in the regime that existed when the Commission filed the application. Those key features are the following: the project pursues the same purported research purpose of gathering information,²⁷ which concern the same seven finch species;²⁸ the project provides for the same licensing conditions, including the granting of licences not to professional scientists but to any person with a general live-capturing licence that owns the

²⁶ Judgment of 22 March 1983, *Commission v France* (42/82, EU:C:1983:88, paragraph 20).

²⁷ See Regulation 1(2) of the Framework Regulations 2020 and of the Framework Regulations 2021.

²⁸ See Regulation 2(2) definition of 'relevant species' of the Framework Regulations 2020 and of the Framework Regulations 2021.

same type clap-net pair and attended the same course;²⁹ and the scope of the derogation regime covers the same time period of 64 days in autumn.³⁰

41. Contrary to Malta's arguments that the Framework Regulations 2021 remedied the Commission's objections raised during the infringement proceedings, the Commission considers that the novelties introduced by the Framework Regulations 2021 and the implementing declarations are insignificant. The introduction of the regulatory body responsible for the research had no significant impact, as that role is performed by the WBRU³¹, which already had that role under the previous framework regulations. The Framework Regulations 2021 granted licences based on requests that were submitted under the predecessor Framework Regulations 2020; the declarations (2020, 2021 and 2022) are almost identical.

42. In my view, Malta's plea of inadmissibility should be rejected.

43. The Court has indeed consistently held that the subject matter of an application under Article 258 TFEU is limited to that defined during the pre-litigation procedure provided for by that article, and that the Commission's reasoned opinion and the application to the Court must therefore be based on the same complaints.³²

44. At the same time, the Court acknowledges that such a requirement cannot, however, go so far as to make it necessary that in every event the national provisions mentioned in the reasoned opinion and in the application should be completely identical. Where a change in the legislation occurred between the pre-litigation and judicial phases of the procedure, it is sufficient that the system established by the legislation contested in the pre-litigation procedure has, in substance, been maintained by the new measures which were adopted by the Member State after the issue of the reasoned opinion, even though the new legislation was not formally challenged in the pre-judicial phase.³³

²⁹ See Regulation 5 to 7 of the Framework Regulations 2020 and Regulations 10 to 12 of Framework Regulations 2021.

³⁰ See Regulation 4 of the Framework Regulations 2020 and Regulation 8 of Framework Regulations 2021.

³¹ See Regulation 3 of the Framework Regulations 2021.

³² See, to that effect, judgments of 17 November 1992, *Commission v Greece* (C-105/91, EU:C:1992:441, paragraph 12 and the case-law cited), and of 4 September 2014, *Commission v Germany* (C-211/13, EU:C:2014:2148, paragraph 23 and the case-law cited).

³³ See, to that effect, judgments of 17 November 1992, *Commission v Greece* (C-105/91, EU:C:1992:441, paragraph 13 and the case-law cited); of 9 September 2004, *Commission v Greece* (C-417/02, EU:C:2004:503, paragraph 17); and of 4 September 2014, *Commission v Germany* (C-211/13, EU:C:2014:2148, paragraph 24 and the case-law cited).

45. Indeed, I agree that if, by each non-substantive change in the legislation under scrutiny, the Member States could cause the need to reopen the infringement procedure from the beginning, that enforcement mechanism would lose its effectiveness. The mere change of legislation cannot therefore be an automatic reason for the inadmissibility of an action before the Court. Nevertheless, as submitted by Malta, this should not result in depriving the defendant State from the possibility of defending itself efficiently.

46. In that regard, I agree with the Commission that the new version of the national legislation which has shaped the Finches Project has not brought a substantive change in those elements identified by the Commission.³⁴

47. Furthermore, the Commission's allegations as to why the Finches Project does not satisfy the requirements of Article 9(1)(b) of the Birds Regulation were intelligible to Malta. That Member State had the opportunity to explain whether and how the new legislation addressed differently the failures alleged by the Commission and to explain to the Court why it considered that that legislation fulfilled the conditions of Article 9(1)(b) of the Birds Directive. Consequently, Malta's rights of defence were respected.

48. Therefore, the present action is, in my view, admissible.

B. Substance

49. In the present case, the Commission claims that Malta has failed to fulfil its obligations under Articles 5 and 8(1) of the Birds Directive, and that the violation of these provisions cannot be based on the research derogation of Article 9(1)(b) of the Birds Directive.

50. Malta has, from the outset and verbatim, based its legislation on Article 9(1)(b) of the Birds Directive. The decision to rely on a derogation cannot be understood other than as Malta's acceptance that, if it were not within the scope of a derogation, the activity which its legislation provides for would be contrary to the Birds Directive.

51. The crux of this case is, therefore, whether Malta has fulfilled the conditions required for the research derogation under the Birds Directive.³⁵

52. In that respect, the Commission relies on three main claims. It contends, first, that Malta has failed to establish that the Finches Project pursues a genuine research purpose; second, that it has failed to state reasons for the absence of

³⁴ See point 40 of the present Opinion.

³⁵ See, to that effect, *One voice*, paragraph 29 and the case-law cited.

another satisfactory solution; and third, that it has failed to demonstrate the absence of another satisfactory solution.

53. The most important and novel question raised by this case concerns the first claim – is Malta’s Finches Project a genuine research project, or is it only a cover, as claimed by the Commission, for perpetuating the activities which breach the Birds Directive? I will first deal with that question (1). My conclusion is that the research project at issue, both in its design and its implementation, has flaws which should direct the Court to conclude that it is not, indeed, a genuine research project. For that reason, I consider the Commission’s second and third claims as only subsidiary. I will deal with them jointly (2).

1. Failure to establish that the Finches Project has a research purpose

54. How can the Court decide whether a project, presented by the legislature of a Member State as a research project, is indeed adopted for research purposes, or whether the Member State only relies on the research derogation in order to enable otherwise illegal activities?

55. The logical answer would be that if a project fulfils all the conditions imposed by the Birds Directive for relying on that derogation, the Court should conclude that it is adopted for research purposes.

56. However, that proposal seems an easier task than it is in reality. While the Birds Directive allows for a research derogation from what would otherwise be considered the prohibited capturing and disturbance of wild birds, it does not contain any indication about the meaning of the wording ‘for the purposes of research’ in Article 9(1)(b) thereof.

57. Nor is any explanation provided in its sister directive, the Habitats Directive, which contains an almost equally worded research derogation, allowing for the departure from the protection which that act sets out for the purpose of the conservation of animals and plants covered by it.³⁶

58. In determining the meaning of the concept of ‘research’, inspiration may be drawn from the Bern Convention on the conservation of European wildlife and natural habitats, to which the European Union is a party.³⁷ Article 9 of that

³⁶ See Article 16(1)(d) of the Habitats Directive. The small difference is the use of the singular form in the English-language version of the Habitats Directive. I do not think that this is an important or intentional difference. Additionally, the French-language version of both the Habitats and the Birds Directive uses the plural, and it is my understanding that the plural is more suitable to refer to both research and teaching.

³⁷ Advocate General Kokott considered that Article 9 of the Birds Directive implemented Article 9 of the Convention on the conservation of European wildlife and natural habitats, signed in Bern on 19 September 1979 (OJ 1982 L 38, p. 3) (‘the Bern Convention’), to which the European Union is a party (Council Decision 82/72/EEC of 3 December 1981 concerning the conclusion

convention provides similarly termed research derogations as in the Birds and the Habitats Directives. With regard to the meaning of such derogations, the Standing Committee of the Bern Convention considered that ‘research is an intellectual activity with the goal of gaining new scientific findings in a methodical, systemic and testable fashion.’³⁸

59. Such a description allows for conclusions about some elements of the concept of ‘research’, both substantive and procedural. The substantive dimension of a research project is its objective; it answers the question as to the body of knowledge the project aims to extend and explains why this question ought to be asked in the first place. The procedural dimension relates to scientific methods it uses; that is, how the desired outcome will be achieved.

60. I therefore propose that, for the purposes of the present case, and without the need to give a more complete definition of ‘research’, the Court establish that a research project must have an objective expressed in a research question and be designed so as to enable the answer to that question. Those elements of a concept of research, for which additionally both parties agree that it implies a ‘scientific research’, were not contested.³⁹

61. When faced with a similar question as the Court in the present case, the International Court of Justice (ICJ), in a case that concerned the Japanese project of whaling in the Antarctic,⁴⁰ also considered that it was not necessary that it provided for a comprehensive definition of ‘research’. That court, however, explained that ‘an objective test of whether a programme is for purposes of scientific research does not turn on the intentions of individual government officials, but rather on whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives’.⁴¹

of the Convention on the conservation of European wildlife and natural habitats (OJ 1982 L 38, p. 1)), which is why that Convention has to be taken into consideration in interpretation of the Birds Directive. See her Opinion in Joined Cases *Föreningen Skydda Skogen and Others* (C-473/19 and C-474/19, EU:C:2020:699, point 73).

³⁸ Standing Committee, *Provisions on Exceptions in accordance with Article 9 of the Bern Convention*, T-PVS/Inf (2011) 23, point 3.5.5, p. 19, available at <https://rm.coe.int/0900001680746b62> (last consulted on 29th February 2024).

³⁹ Relying on Day, R. and Gastel, B., *How to Write and Publish a Scientific Paper*, 9th ed., Cambridge University Press, 2022, Malta offered the following elements as constituent of a scientific research project: such project must formulate a research question; make a choice of a research design; provide for the methods of data collection and data analysis; and, finally, interpret and report the results. Malta maintains that the Finches Project contains all these elements. The Commission does not dispute Malta’s definition of scientific research. However, it disputes that the Finches Project meets that definition.

⁴⁰ Judgment of 31 March 2014 of the International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 2014, p. 226, pp. 258.

⁴¹ *Ibid.*, paragraph 97 of the judgment.

62. I propose that the Court adopts a similar method and assess whether the design and implementation of the Finches Project is reasonable for the stated research objectives of that project.

63. The Commission raised issue both with the stated research objectives and with the design and implementation of the Finches Project. I will address those issues in turn.

(a) *Research question and its objective*

64. The research question of the Finches Project is worded as follows: ‘Where do finches that migrate over Malta during post-nuptial (autumn) migration come from?’⁴²

65. The Commission claims that the objective of that research question is not a conservation objective. Malta rather looks for the answer to that question only in order to (re)introduce the recreational derogation.

66. In the Commission’s view, the derogation provided for in Article 9(1)(b) of the Birds Directive can be relied on only for research that has a conservation objective.

67. Malta confirmed that the need to answer the research question of the Finches Project was indeed recognised after the Court pointed to the knowledge gap in its judgment in *Commission v Malta*. However, it claims that filling the knowledge gap that prevents Malta from introducing a recreational derogation could be the objective of a research project under Article 9(1)(b) of the Birds Directive.

68. In addition to this, Malta explains that the Finches Project also has a wider, conservation objective. It claims that learning where the finches flying over Malta come from can help Malta in designing its conservation policy. In particular, the data produced by the Finches Project would make it possible to identify relevant migratory routes and, therefore, help to direct habitats conservation efforts and to design land-use planning that would protect stopover sites and essential routes.

69. In my opinion, the Commission’s position that the objective of a research project under Article 9(1)(b) of the Birds Directive must solely be a conservation objective cannot be accepted. Research that requires derogation from the protection of birds can serve any legitimate research interest. In that respect, for as

⁴² That question is presented as the underlying question of the Finches Project in ‘Malta’s finches research project: scope and methodology’, WBRU, p. 4. That report seems to be the expert report drawn up before the introduction of the Finches Project. The document submitted to the Court (as Annex B.2 to the defence) states that it was adopted in May 2020, but was only published in March 2023 as an updated version. In its submissions, Malta confirmed that this is indeed the research question of the Finches Project.

long as the recreational trapping of birds is seen as a permitted judicious use of the recreational derogation, provided that only small number of birds are captured, gathering data for the introduction of such derogation cannot be objected to for having an illegitimate objective.

70. Research for the advancement of conservation objectives is encouraged by a different provision of the Birds Directive. Article 10 of that directive provides that ‘Member States shall encourage research and any work required as a basis for the protection, management and use of the population of all species of bird referred to in Article 1.’ That is an argument in favour of my position that Article 9(1)(b) of the Birds Directive must be construed as also permitting research for legitimate purposes other than conservation.

71. At the same time, I am of the opinion that, even if it does not need to aim at improving conservation methods, a research under a derogation provision cannot result in the prevention or obstruction of the conservation objectives of maintaining the good conservation status of a species.

72. Returning to the circumstances of the present case, the Framework Regulations 2020 defined the objective of the Finches Project differently from the Framework Regulations 2021. The express reference to recreational derogation, which was present in the Framework Regulations 2020, was deleted in the Framework Regulations 2021.⁴³ At the hearing, however, Malta clarified that the possible introduction of the recreational derogation is still one of the objectives of the Framework Regulations 2021 despite the change in wording.

73. The research question which the Finches Project aims to answer seems appropriate to me for filling the knowledge gap found by the Court in *Commission v Malta* in relation to the recreational derogation.

74. Conversely, even though, according to Malta, the Finches Project has wider conservation objectives, that State has not explained, except in very broad terms, the conservation objectives the project wishes to address. It is therefore difficult to establish the link between the research question about the provenance of birds flying over Malta in autumn and possible conservation objectives.

75. Nevertheless, affording Malta the benefit of the doubt, I will proceed with my analysis on the premiss that the Finches Project also has a wider conservation objective. When assessing the reasonableness of the design of a project, it is necessary to take into consideration its objectives. I will therefore assess whether the project’s design can be justified in the light of both of its stated objectives.

⁴³ Regulation 2(1) of the Framework Regulations 2020 expressly mentions gathering data for the introduction of the recreational derogation in the future as an objective of the Finches Project. Regulation 2(1) of the Framework Regulations 2021 no longer expressly states such a purpose.

(b) Research design and implementation

76. As explained, the design and the way a project is implemented has to be reasonable.⁴⁴ That means that the disturbance of birds, in principle prohibited by the Birds Directive, has to be justified by the objectives of the project.⁴⁵

77. I will separate the issues of research design and implementation of the Finches Project by dealing, on the one hand, with those aspects challenged by the Commission, which I find to be reasonable parts of that project's design and, on the other hand, with those aspects that I do not find reasonable.

(1) Acceptable elements of the Finches Project design

78. The Commission argues that the use of clap-nets is not justified, that the number of trapping sites is excessive and is not clearly linked to the question being addressed. Furthermore, given the low number of ringed specimens trapped in Malta, collecting the data from the ringed birds simply cannot answer the research question within a reasonable timescale. It is claimed that, under the current project's design, it would take around 70 years to collect necessary number of rings.

79. In my view, Malta offered convincing arguments against those elements raised by the Commission as design flaws. First, both clap-nets and mist-nets are, in principle, prohibited by Annex IV to the Birds Directive and can only be used under one of the derogations. Therefore, if birds must be captured, and this seems to be the only scientifically available method today to read data from rings on ringed finches, the use of clap-nets enables a more selective capturing of birds than mist-nets. Given that the Finches Project targets seven specific breeds of finches, such a choice seems justified.

80. Second, I can agree that the large number of birds trapped on the large area of the country is not necessarily a flaw of the project. Such a design raises the chances of trapping a bird with the ring and gathering the necessary information faster. Nevertheless, one argument offered by Malta in that respect cannot be accepted. Malta stressed that, unlike in a previous recreational project, trapping a large number of birds is not a problem, as they are released into the wild unharmed. However, the fact that finches are released after being captured cannot be understood as justifying the design of the project in itself. It should not be forgotten that, under the Birds Directive, the entrapment and disturbance of birds is also prohibited, not only keeping or killing them.

⁴⁴ See points 60 and 61 of the present Opinion.

⁴⁵ On the need for proportionality of any measure based on Article 9 of the Birds Directive, see judgment of 10 September 2009, *Commission v Malta* (C-76/08, EU:C:2009:535, point 57) and *One Voice*, paragraph 61 and the case-law cited.

81. Third, with regard to the saturation set at 60 to 70 rings collected per finch species, which allows for the conclusion that sufficient data for drawing reliable conclusions is gathered, I do not consider that the Court is sufficiently informed to decide on that aspect. The same is true for the projections of the possible end of the project.

(2) *Unacceptable flaws in research design and implementation*

82. As I have already proposed, in considering whether a project is a genuine research project, the Court should focus on its reasonableness. The assessment of the reasonableness of a research project requires weighing the disturbance of wild finches required by the project, which is prohibited by the Birds Directive, against the scientific objective of the project. The more important the project's objective, the easier it is to justify the capturing and disturbance. The less important the aim, the more difficult to justify the project, which might lead to a conclusion that capturing and disturbance of birds should not be allowed.

83. The balancing exercise also has to take into consideration that the project at issue involves live animals.⁴⁶ It must be borne in mind that the protection of animal welfare is, in accordance with Article 13 TFEU, an objective of general interest recognised by the European Union.⁴⁷ The Court has already explicitly acknowledged its significance in relations with the Birds Directive.⁴⁸

84. With regard to the reasonableness of the Finches Project, the Commission points to the following flaws in the project's design. First, there does not exist a comprehensive data collection method which could justify the disturbance of the birds, and the project is erroneously focused on recording specimens that are already ringed. Second, the data collectors who participate in the project are not adequately trained and have a conflict of interest which should prevent their participation in the project.

(i) *Project's focus on only already ringed specimens*

85. In relation to the first argument, basing its claims on the findings of the BirdLife Malta and EURING reports, the Commission first contends that the focus

⁴⁶ See, in that respect, ethical considerations and procedures to be included in the projects proposed under the Horizon 2020 programme, at: https://ec.europa.eu/research/participants/docs/h2020-funding-guide/cross-cutting-issues/ethics_en.htm.

⁴⁷ See, to that effect, judgments of 17 December 2020, *Centraal Israëlitisch Consistorie van België and Others* (C-336/19, EU:C:2020:1031, paragraph 63), and of 29 February 2024, *cdVet Naturprodukte* (C-13/23, EU:C:2024:175, paragraph 49). In that respect, the European Union enacted Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes (OJ 2010 L 276, p. 33).

⁴⁸ *One voice*, paragraphs 39 and 65.

of the project on the provenance of finches is wrong. In their view, ‘in order to inform improved conservation and management of finches wintering in Malta, and to provide a basis for monitoring the effectiveness of future conservation measures, it is important to understand their distributions, numbers and turnover as well as their migratory origins.’ The initial emphasis of a credible project should not be on population origins, but the project should first estimate the size, composition and turnover of finch populations occurring in Malta during the non-breeding season. That component could be fulfilled by observational surveys, which would ‘provide basic information on seasonal abundances and habitat use, identifying those areas and habitats that are of most importance and should be assigned the highest conservation priority with respect to these species.’⁴⁹

86. That argument was not refuted by Malta. Indeed, if seen only in the context of its purpose of enabling the (re)introduction of a recreational derogation, by addressing the knowledge gap recognised by the Court in *Commission v Malta*, gathering data about the provenance of birds might seem an adequate focus for the project. However, focus on only that kind of information, especially when lacking other relevant data that cannot be gathered by the Finches Project, cannot justify the disturbance of birds in the light of a wider conservation objective.

87. The second highly problematic flaw in the design of the project is that the catching of birds is allowed only to read and record data from captured specimens that are already ringed. That, as claimed by the Commission, is not scientifically or ethically justified. When birds are captured during ringing operations, all appropriate scientific data should be collected to ensure that the scientific use of the data can be maximised. The collection of data not only from the ring, but also additional data about each captured bird, such as age and sex, weight, the state of feathers, measurement of wings and similar, together with ringing all captured specimens, could indeed justify the actions otherwise prohibited by the Birds Directive. For this, the participation of educated and skilled ringers would be necessary.

88. In that respect, it is necessary to recall that, in its original design under the relevant legislation, the Finches Project indeed provided not only for the collection of data from already-ringed birds, but also for the ringing of all captured birds. For the implementation of that part of the project, it was envisaged that a special permit for participation in the project could be granted to a licensed bird ringers. However, because of the mistrust in the proposed project by the relevant ringing organisation – EURING, bird ringers active in Malta refused to participate in the project.⁵⁰ In fact, a Europe-wide call for ringers did not succeed,

⁴⁹ EURING, Advice to the European Commission on Collection of data to inform the conservation and management of Maltese Finch Populations (Annex A.21 to the application), p. 12.

⁵⁰ See, in that respect, the minutes of the Malta Ornithology Committee meeting on Wednesday, 26th August 2020, (Annex A.20 to the application), point 5.29, p. 13.

according to Malta. For that reason, in the three years under scrutiny, the project was implemented only to gather data from already ringed birds.

89. The capturing of birds on a large scale, as envisaged by the Finches Project, only to collect the data from ringed birds cannot, in my view, justify the project, regardless of whether its objective is only to enable the (re)introduction of the recreational derogation, or whether it indeed pursues wider, conservation objectives. In both scenarios, disturbance of the birds on such a large scale would be disproportionate to the scientific benefit of the project.⁵¹

90. The non-participation of bird ringers in the Finches Project could have possibly been avoided had the legislator given up part of the project design. One of the controversial issues because of which ringers refused to participate in the Finches Project was the use of live decoys. That, however, does not seem necessary in order to enable capturing the finches by clap-nets. It is equally efficient to use the pre-recorded bird callers.⁵² As such a change in project's design might enhance its reasonableness, because birds could be ringed in parallel to recording the existing information on rings, and without decreasing the efficiency of capturing method, one has to ask whether this part of the project design does not serve a purpose different from the research purpose. That part of the design enables the perpetuation of recreational activities of finch trapping in which traditionally live decoys were used.⁵³

(ii) *Data collectors and citizens science*

91. That brings me to the next argument raised by the Commission, which concerns the inappropriateness of the participation in the project of persons who participated in earlier recreational derogation project.

92. The main answer Malta offers to these allegations is citizen science. Malta claims that citizen science is an idea strongly supported by the Commission, and is

⁵¹ According to data available to the Court, only 10 rings were gathered in 2020 (WBRU's 'Report on the Outcome of the Autumn 2020 Research Derogation to Determine Malta's reference population of the seven finch species', March 2021 (Annex A.11 to the application), point 5.2.), and 22 in 2021 (WBRU's 'Report on the Outcome of the Autumn 2021 Research Derogation to Determine Malta's reference population of the seven finch species', March 2022 (Annex B.27 to the statement of defence), point 5.2).

⁵² Indeed, the Maltese Ornis committee voted at its meeting in favour of adding the bird callers to the possible use of live decoys by trappers. A representative of BirdLife Malta voted against due to the continued use of live decoys. See, in that respect, The minutes of the Malta Ornis Committee meeting on Wednesday, 26th August 2020 (footnote 50 of the present Opinion) points 5.14, 5.26 and 5.30. At the hearing, Malta did not explain why such a change was not introduced, but only repeated that the use of bird callers was added as a supplementary possibility to the use of live decoys.

⁵³ See, in that respect, The minutes of the Malta Ornis Committee meeting on Wednesday, 26th August 2020 (footnote 50 of the present Opinion) point 5.14.

surprised by the Commission’s position in the present case.⁵⁴ It further maintains that including persons holding the live-capturing licence which they acquired as part of a recreational trapping derogation is appropriate, as these persons know how to use clap-nets. Finally, Malta insists that only those trappers who undergo a training may acquire the special licence that qualifies them for participation in the Finches Project.

93. Citizen science is indeed an idea supported by the European Union.⁵⁵ However, the idea of including citizens in scientific projects is not to design projects for the purpose of citizens’ participation, but rather to include citizens in research projects that are in themselves justified by some relevant research objective. The participation of citizens should be made possible for all individuals who desire to participate in the project and should not be discriminatory, even if certain conditions for participation may be imposed.

94. On the contrary, the Finches Project is designed in such a way that only persons who possess the general live-capturing licence, that is no longer issued but is in possession only by former participants of the recreational derogation project, may apply for the special licence for participating in the Finches Project.⁵⁶ This was confirmed by Malta at the hearing. That Member State, however, did not offer a reasonable explanation why the project, if based on the idea of citizen science, is not open to all citizens who might wish to participate. One argument that was offered explained that persons in possession of a general live-capturing licence know how to use clap-nets. However, no explanation followed why other citizens would not be able to learn how those nets should be used for the purposes of the project.

95. The mandatory training for becoming eligible for the special permit seems to be focused only on informing the potential participants about the legal design of the project, including – not least – the obligation to immediately release the captured birds. From the data presented to the Court, it does not seem that the training at issue creates any skills necessary to gather data, for example, how to

⁵⁴ In that respect Malta mentions the 2013 Green Paper on Citizen Science, available at <http://societize.eu/sites/default/files/Green%20Paper%20on%20Citizen%20Science%202013.pdf>; Commission Recommendation (EU) 2024/736 of 1 March 2024 on a Code of Practice on citizen engagement for knowledge valorisation (OJ L 2024/736).

⁵⁵ The European Commission funds the EU citizens science initiative within its Horizon 2020 project, explained at: <https://eu-citizen.science/>. The site lists 328 projects that are engaging the public in research via citizen science activities.

⁵⁶ Regulations 5.3(a) of the Framework Regulations 2020 and Regulations 10.5(a) of the Framework Regulations 2021. See also WBRU’s ‘Report on the Outcome of the Autumn 2020 Research Derogation to Determine Malta’s reference population of the seven finch species’, March 2021 (Annex A.11 to the application), point 4.1; and WBRU’s ‘Report on the Outcome of the Autumn 2021 Research Derogation to Determine Malta’s reference population of the seven finch species’, March 2022 (Annex B.27 to the statement of defence), point 4.1.

properly use clap-nets or how to distinguish seven species of finches one from the other and from other birds.⁵⁷ That indeed does not seem sufficient training that would enable any interested citizen to participate in the project.

96. The other projects allegedly comparable to the Finches Project, which Malta mentioned in its defence, as involving citizens in bird research, did not involve citizens in any invasive actions in relation to birds. Rather, those projects mostly concerned observation and notification of the observed data.⁵⁸ Additionally, as EURING explains, citizens who participate in the ringing projects undergo serious training, lasting often for a year, and participate in the project alongside professional ringers.⁵⁹

97. I can agree with Malta that the inclusion of persons previously participating in recreational trapping of finches does not in itself present a problem, and can even have an educational component, especially as keeping the birds is prohibited under the project.

98. However, that does not explain why only those persons are invited to participate in the citizen science opportunities of the Finches Project. That is not in line with the concept of citizen science. It is rather an indication that the project was indeed designed and implemented with the aim of allowing that particular group of citizens to continue its recreational activities of trapping finches.

99. Malta pointed out that the project provides for the monitoring of the implementation and the enforcement, which should disable data collectors to keep the captured birds. Additionally, the numbers related to the last two years of the project implementation show the effective implementation controls in practice. In that regard, Malta has supplied substantial figures of strong efforts to improve the enforcement of its legislation. For instance, for the year 2021, during the opening of ‘research periods’, and bearing in mind that there had been 2 904 special licences issued under the terms of the present derogation, there was a statutory requirement of 50 officers during permitted hours and those forces carried out 3 111 spot checks in total, which identified 122 illegalities.⁶⁰

⁵⁷ Lacking any further detailed information about the training, it may be concluded from the sample test that candidates for the license need to pass, which was included in the documents submitted to the Court as Annex B.3 to the statement of defence.

⁵⁸ Malta referred to eBird, the Christmas Bird Count and Breeding Bird Survey which, as conceded in its submissions, focus on non-invasive observation and monitoring.

⁵⁹ See, for instance, the British Trust for Ornithology and the Bird Banding Laboratory in the USA.

⁶⁰ Those figures have been confirmed by the letter from the Commissioner of Police. See Annex B.28 to the defence.

100. That might indeed have led to the fewer instances in which the captured birds are not released. However, as pointed out by the Commission at the hearing, it is strange that a genuine research project requires such a constant and sizeable mobilisation of law enforcement resources.

101. Finally, not only is the design of the Finches Project difficult to defend through the lens of citizen science, but that project is also not involved in cooperation with any other research projects. However, one would expect that the project that is dependent on the data from other countries and can contribute to other projects concerned with the movement of birds would envisage domestic and international cooperation with similar projects.⁶¹

102. In conclusion, I agree with the Commission that the evidence provided does not establish that the Finches Project's design and implementation are genuine and reasonable in relation to achieving its stated objectives. For this reason, it cannot be justified under the research derogation of Article 9(1)(b) of the Birds Directive.

2. Absence of another satisfactory solution and the duty to state reasons

103. The Commission argues that Malta has not explained why it is not possible to answer the research question by other methods, nor did it clearly explain this in the legislation introducing the derogation.

104. Malta replies that the reports to which the declarations implementing the Framework Regulations 2020 and 2021 refer explain in a sufficiently clear way why there is no appropriate alternative to the Finches Project.

105. First, whatever the reason for derogation allowed under Article 9 of the Birds Directive, that provision contains in its paragraph 1 a condition that such derogation can be used only 'where there is no other satisfactory solution'.

106. I have already explained why I consider that the design and implementation of the Finches Project is not reasonable for the purpose to achieving its research objectives. I therefore consider that it is not adopted for the purposes of research. Therefore, the question of the alternative does not arise.

107. If, however, the Court finds that the Finches Project has been adopted for the purposes of research, I am of the opinion that, as the Commission claims, Malta has not clearly explained why the two alternatives mentioned are insufficient.

⁶¹ See also, similarly, judgment of 31 March 2014 of the International Court of Justice, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, ICJ Reports 2014, paragraphs 220 to 222.

108. The aim of the Finches Project is to establish where the finches that fly over Malta come from. For this, the project proposes the use of the methods that are prohibited by the Birds Directive – capturing the birds, and the use of clap-nets. For the Finches Project to be justified on the basis of Article 9(1)(b) of the Birds Directive, it is therefore necessary that Malta establish that other methods that are not contrary to that directive, or that involve a derogation, but are less intrusive, are not available.

109. The first alternative the Commission mentioned concerns the involvement of expert ornithologists. The Commission has not clearly explained in what way they are to be involved. Certainly, they must be involved in the design of the project, analysis of the gathered data, drawing conclusions from those analyses and finally, the publication of the project's results.⁶²

110. However, the problem with the non-involvement of ornithologists in the Finches Project design which the Commission stressed was at the point of the gathering of the data from bird rings and gathering additional information from the captured birds.

111. In that respect, it seems to me that Malta cannot claim that the more satisfactory alternative would not be that ornithologists participated in the project, given that it originally envisaged the participation of bird ringers at the point of data gathering. However, after its attempt to involve ornithologists failed, Malta disregarded that original aspect of the project's design and continued with its implementation without the participation of ornithologists. A first alternative obviously existed, but was neglected by Malta.

112. The second alternative that was mentioned was large-scale modelling. Even though Malta adduces multiple reasons why that option is less efficient than the project based on the collection of data from the bird rings, it does not claim that such a method is unable to answer the research question and thus fill the knowledge gap at issue. Given that large-scale modelling is a research method that is not intrusive, and is therefore not contrary to the Birds Directive, discarding such method would necessitate a more thorough explanation.

113. I consider that Malta has not clearly explained why other available methods are not suitable for filling the knowledge gap, the identification of which is the reason the Finches Project was developed. Therefore, the statements of reasons contained in the implementing legislation (declarations) do not fulfil the standard

⁶² The Standing Committee to the Bern Convention explained that, whether organised by public or private institutions, or even individuals, research must be conducted by 'the researcher ... well grounded in corresponding educational training' and must be 'directed toward having a public effect'. Standing Committee, *Provisions on Exceptions in accordance with Article 9 of the Bern Convention*, T-PVS/Inf (2011) 23, p. 20 available at <https://rm.coe.int/0900001680746b62> (last consulted on 29th February 2024).

of legal certainty established by the case-law,⁶³ which requires a clear and sufficient statement of reasons explaining how the conditions of Article 9 are fulfilled, including why the authority that introduces the derogatory measure believes that another satisfactory alternative does not exist.⁶⁴

114. No statement of reasons as to the available alternative is provided for in the Framework Regulations 2020 or 2021. The three implementing declarations, opening the research period for the years 2020, 2021 and 2022 do contain some statement of reasons. Whereas the Declaration 2020 only implicitly point to underlying studies used to design the project, the subsequent declarations point to those studies more explicitly in footnotes. However, neither those studies, nor the arguments offered during the procedure before the Court, clearly answer the question as to why the other methods had to be discarded. It is not claimed that they are not appropriate, only that they are less efficient.

115. Thus, the Commission has sufficiently demonstrated that Malta failed to state reasons for the absence of another satisfactory solution, and to demonstrate the absence of another satisfactory solution

116. In the light of all the foregoing, I propose that the Court finds that Malta failed to fulfil its obligations under Articles 5 and 8(1) of the Birds Directive, read in conjunction with Article 9(1) of that directive.

VI. Costs

117. Under Article 138(1) of the Rules of Procedure of the Court, 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 has claimed that the Republic of Malta should be ordered to pay the costs and the Republic of Malta has been unsuccessful, it must be ordered to pay the costs.

VII. Conclusion

118. In the light of the foregoing considerations, I propose that the Court:

- Declare that by adopting a derogation scheme allowing the live-capturing of seven species of wild finches (Chaffinch *Fringilla coelebs*, Linnet *Carduelis cannabina*, Goldfinch *Carduelis carduelis*, Greenfinch *Carduelis chloris*, Hawfinch *Coccothraustes coccothraustes*, Serin *Serinus serinus* and Siskin

⁶³ Judgments of 8 June 2006, *WWF Italia and Others* (C-60/05, EU:C:2006:378, paragraph 34 and the case-law cited); *Commission v Malta*, paragraph 47; and *One voice*, paragraph 28.

⁶⁴ See, for example, judgment of 11 November 2010, *Commission v Italy* (C-164/09, not published, EU:C:2010:672, paragraph 26); *Commission v Malta*, paragraph 50; and *One voice*, paragraph 31.

Carduelis spinus), the Republic of Malta has failed to fulfil its obligations under Articles 5 and 8(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, read in conjunction with Article 9(1) of that directive;

- Order the Republic of Malta to bear its own costs and to pay those incurred by the European Commission.