



INFO-RAPIDE EN10/23

Luxembourg, 30th May 2024

Advocate General's Opinion in Case 23/23 | Commission v Malta

AG Ćapeta: The Court should find that Malta's derogation allowing live capture of finches breaches the Birds Directive

The AG suggests that the Court should declare that by adopting a derogation scheme allowing the live capturing of seven species of wild finches, Malta has failed to observe its obligations under EU law.

The European Commission initiated the present infringement procedure against Malta alleging that it has failed to fulfill the conditions required for the research derogation under Article 9(1)(b) of the Birds Directive, and also failed to demonstrate the absence of another satisfactory solution. Advocate General Ćapeta finds that the Finches Project adopted by Malta is not a genuine research project, considering that the current capture and disturbance of wild finches is disproportionate to the scientific benefit of the project, hence unjustifiable under EU law.

FACTS

In the European Union, wild finches are protected by the Birds Directive ¹ ("Directive"). The primary objective of the Directive is the preservation of all bird species diversity, meaning that the deliberate killing or capture of birds (Article 5) and the use of large scale or non-selective methods to do so is forbidden (Article 8). Despite this, the Directive, however, prescribes specific circumstances whereby the general prohibition may be derogated from (Article 9).

When Malta joined the EU, the relative Accession Treaty provided for a transition period whereby Malta obligated itself to gradually phase out the activities of bird trapping since such practice is prohibited under the Directive.

After successfully banning finch trapping, in **2014** Malta adopted the recreational derogation regime provided for under Article 9(1)(c) of the Directive to enable the trapping of seven species of wild finches as a recreational activity. In **2018**, the Court in *Commission v Malta* ² declared that this regime failed to meet the respective derogation conditions, namely the criterion relating to "small number" (known as the knowledge gap) and consequently Malta repealed it.

In **2020** Malta adopted the Finches Project under Framework Regulations 2020 ³, which provided for the live capture of the same seven species of wild finches, however this time under a different derogation - the derogation for purposes of research under article 9(1)(b) of the Directive. The Commission views this as simply a 'cover up' to enable to continuation of the previous recreational regime, and for this reason, and amongst others, has initiated the present infringement action.

On **3rd December 2020** the Commission sent Malta a letter of formal notice indicating that the Finches Project is inconsistent with the provisions of the Directive and not justified by the derogation provided

for in article 9(1)(b). Malta replied on the **3rd February 2020** claiming that the Project is indeed justified by the derogation since it serves research purposes, particularly that of answering the research question; *“where do finches that migrate over Malta during post-nuptial (autumn) migration come from?”*. Ultimately, the Commission delivered its reasoned opinion on **9th June 2021** expressing the same grievances as in the formal notice.

Following discussions between the two parties, Malta repealed Framework Regulations 2020 and adopted Framework Regulations 2021⁴ on **19th October 2021**. On **20th December 2023**, the Commission lodged its application requesting the Court to declare that Malta has failed to fulfil its obligation under the Birds Directive, to which Malta filed its defence on **21st April 2023** requesting the Court to dismiss the action on the basis of inadmissibility or, in the alternative, as unfounded. An oral hearing was held on **7th March 2024** in Luxembourg.

Malta's plea of inadmissibility stems from the change in national legislation that occurred between the issuing of the reasoned opinion and the filing of the application. The Commission's reasoned opinion referred to Malta's Finches Project as regulated by Framework Regulations 2020, whilst its application challenged also Framework Regulations 2021, which were a result of the above referred to national amendments. The Commission views both Framework Regulations as constituting the same conduct and therefore treats them collectively as one measure

OPINION

AG Ċapeta finds that the mere change of legislation cannot be an automatic reason for the inadmissibility of an action before the Court and therefore, **it is her view that Malta's plea of inadmissibility should be rejected**. In agreement with the Commission, the legislation contested in the pre-litigation procedure (Framework Regulation 2020) has, in substance, remained the same even after the new measure was adopted (Framework Regulation 2021) – the novelties introduced did not offer substantive changes, and were insignificant in remedying the objections originally raised by the Commission in its reasoned opinion.

Additionally, contrary to what Malta alleged, **AG Ċapeta claims that Malta's right to defence were respected** since it was given 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 that legislation fulfilled the conditions stipulated under Article 9(1)(b) of the Directive.

In fact, in today's Opinion, AG Ċapeta concludes that the Finches Project, both in regards to its design and implementation is flawed, to the extent that **the Court should find that it does not establish a genuine research purpose and hence cannot be considered as being justified under the derogation of Article 9(1)(b)** of the Directive.

Summary of AG Ċapeta's reasons:

1. The fact that under the Project, data is read and recorded only from those captured specimens which are already ringed.

AG Ċapeta states that large scale capturing of birds, as envisaged under the Finches Project, simply to collect data from birds already ringed, cannot justify the project - irrespective of the objective, be it to reintroduce the recreational derogation envisaged under the original Framework Regulation 2020 or, as Malta claims, to pursue wider conservation objectives.

2. The inadequately trained data collectors involved in the Project and their conflict of interest, which in itself should prevent their participation.

AG Ćapeta agrees with Malta in so far as the inclusion of persons who previously participated in the recreational derogation project is not in itself problematic, since it can even have an education component. However, despite claiming that the Project is based upon the concept of citizen science, Malta failed to explain the reasons why the Project is not open to all citizens who may wish to participate, since this is definitely not in line with citizen science. In fact, this is a clear indication that the project was designed and implemented with the aim of allowing a particular group of citizens to continue the recreational trapping of finches. Additionally, the fact that the project is not involved in the cooperation with any other research project, makes it even more difficult for Malta to defend it through the lens of citizen science.

3. Malta failed to prove the absence of another satisfactory solution to answer the research question posed by the Project.

The derogation allowed under Article 9(1)(b) may only be resorted to “where there is no other satisfactory solution”, meaning that it must be proven that other methods, which are either accepted by the Directive or involve a derogation and which are less intrusive are not available. In this regard, the Commission proposed two alternatives; the first being the involvement of expert ornithologists, which was originally envisaged by Malta but was subsequently neglected after the involvement of bird ringers at the point of data gathering failed and the second was large scale modelling. Despite these efforts, the AG finds that Malta failed to explain why such methods would not be able to answer the research question at issue.

BACKGROUND INFO

ABOUT THE DIRECTIVE

The Birds Directive, together with the Habitats Directive provide the fundamental legislative framework for the conservation of bio-diversity. Many species of wild birds are threatened or have poor conservation status, mainly attributable to habitat loss, unsustainable hunting, urban sprawl etc ..., and therefore, the primary aim of the Birds Directive is the preservation and restoration of all bird species diversity. To achieve this, the Directive requires all Member States to protect all wild bird species and preserve, maintain and restore their habitats – it regulates the protection, management and control of all wild bird species within the European territory of Member states, whilst also laying down rules for their exploitation.

Article 5 of the Directive prohibits the deliberate killing or capture of birds by any method as well as the deliberate disturbance of birds.

Article 8 of the Directive states that the use of large scale and/or non-selective methods of capture or killing of birds is prohibited, including those methods capable of causing the local disappearance of a species. From *Commission v Malta*, it results that the use of clap-nets, which use is provided for by the Finches Project, is amongst the forbidden means and methods of capture indicated by the Directive.

Although the general principle of the Directive is the prohibition of the trapping of birds, under certain circumstances and where there is no other satisfactory solution, this prohibition may be derogated from. Of particular importance to the present action, is Article 9(1)(b) which provides that a derogation is justified;

"For the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes" and,

EU Directives are not directly applicable throughout Member States, they require the implementation of national laws to incorporate their rules.

In Malta, the national legislation transposing the Birds Directive is subsidiary legislation titled the "[Conservation of Wild Birds Regulations](#)", supplementing the "[Environment Protection Act](#)". Additionally, the derogation for purposes of research under Article 9(1)(b) of the Directive is provided for in a separate subsidiary legislation titled "[Conservation Of Wild Birds \(Framework For Allowing A Derogation To Carry Out Scientific Research On Seven Finch Species\) Regulations](#)".

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: An action for failure to fulfil obligations directed against a Member State which has failed to comply with its obligations under EU law may be brought by the Commission or by another Member State. If the Court of Justice finds that there has been a failure to fulfil obligations, the Member State concerned must comply with the Court's judgment without delay. Where the Commission considers that the Member State has not complied with the judgment, it may bring a further action seeking financial penalties. However, if measures transposing a directive have not been notified to the Commission, the Court of Justice can, on a proposal from the Commission, impose penalties at the stage of the initial judgment.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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¹ [Directive 2009/147/EC](#) of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

² Judgment of the Court of Justice of 21 June 2018 *Commission v Malta*, Case [C-557/15](#) (see also [Press Release No 90/18](#)).

³ [Subsidiary Legislation 549.137](#) "Conservation of Wild Birds (Framework for Allowing a Research Derogation To Determine Malta's Reference Population of Seven Finch Species) Regulations". *Repealed by Legal Notice 387 of 2021*.

⁴ [Subsidiary Legislation 549.145](#) "Conservation of Wild Birds (Framework for Allowing a Derogation to Carry out Scientific Research on Seven Finch Species) Regulations".