



## INFO-RAPIDE EN13/23

Luxembourg, 19<sup>th</sup> September 2024

Judgment in Case C-23/23 | Commission v Malta (Derogations for research purposes)

### Malta's derogation allowing live capture of finches breaches the Birds Directive

*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.**

**The Court finds that by adopting a derogation allowing to capture live individuals of 7 species of wild finches, the Republic of Malta has failed to fulfil its obligations under Directive 2009/147 on the conservation of wild birds.**

#### FACTS

In the European Union, wild finches are protected by the **Birds Directive** <sup>1</sup> ("Directive"). The primary objective of the Directive is the preservation of all bird species diversity, forbidding the deliberate killing or capture of birds (Article 5) and the use of large scale or non-selective methods to do so (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 committed 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* <sup>2</sup> 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conditions, namely the criterion relating to "small number" (known as the "knowledge gap") and consequently Malta repealed it.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** <sup>3</sup>, which provided for the live capture of the same seven species of wild finches, this time however 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 **December 3, 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 **February 3, 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 **June 9, 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 2021** <sup>4</sup> on **October 19, 2021**. On **December 20, 2023**, the Commission lodged its application requesting the Court to declare that Malta has failed to fulfil its obligation under the Birds Directive.

Malta filed its defence on **April 21, 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 **March 7, 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.

On **May 30, 2024**, Advocate General Tamara Čapeta delivered her opinion on this case.

## JUDGMENT

The Court finds that the by adopting a derogation allowing the live capture of individuals of 7 species of wild finches <sup>5</sup>, the **Republic of Malta has failed to fulfil its obligations under Articles 5, 8(1) 9(1) of Directive 2009/147 on the conservation of wild birds.**

The Finches Project **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.

### Considerations of the Court

#### *Admissibility:*

In line with AG Čapeta's opinion finding that the mere change of legislation cannot be an automatic reason for the inadmissibility of an action before the Court, the **action is admissible.**

#### *Merits:*

The Republic of Malta **has failed to establish that its derogating regime pursues a research objective**, because that regime is:

- a) not based on scientific methods,
- b) gives rise to defective application,
- c) pursues an objective unconnected with wild finches conservation and, in any event,
- d) is inappropriate for attaining the declared objective.

The Republic of Malta **has also failed to state reasons for the absence of any other satisfactory solution**, and, **has failed to demonstrate the absence of any other satisfactory solution.**

The fact that the Republic of Malta has amended its legal framework and introduced new procedures, new bodies and new participants in the research derogation, and strengthened the enforcement mechanisms, is **not such as to demonstrate that the regulatory framework adopted in 2021 constitutes a new regime in relation to the subject-matter of the present action.**

**Secondly, the contested measure are clearly defined in the application:** the Commission's application clearly states that the contested derogation regime for research includes the 2020 framework rules, the 2020 declaration, the 2021 framework rules and the 2021 and 2022 declarations, as well as any future measures of the same type constituting the same conduct.

**The declarations of 2020, 2021 and 2022** authorising the trapping of finches of the species concerned during the 'research periods' of 2020, 2021 and 2022 **do not comply with Article 9 of Directive 2009/147.**

It is true that the **Maltese legislation sets out the criteria for derogation in a clear and precise manner and requires the authorities responsible for their application to take them into account.** Indeed, regulation 9 of the Rules on the Conservation of Wild Birds essentially transposes Article 9 of Directive 2009/147, while regulation 4 of the Framework Rules 2020 and regulation 8 of the Framework Rules 2021 require the Minister to verify, when opening a search period, that there is no other satisfactory solution.

However, it appears that **the declarations of 2020, 2021 and 2022 authorising the trapping of finches** of the species concerned during the 'research periods' of 2020, 2021 and 2022 **do not contain any precise and adequate reasoning as to why there is no such solution and do not even mention other scientific research methods currently used in the ornithological field,** either to confirm or to reject them.

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## BACKGROUND INFO

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### 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 intentional killing or capture of birds by any method as well as the deliberate disturbance of birds, and bans keeping captive birds of species that may not be hunted or captured.

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](#)".

#### PRINCIPLES ARISING FROM PREVIOUS CASE LAW

- **The national rules** applicable in that area **must set out the criteria for derogation clearly and precisely and require the authorities responsible for their application to take them into account.**
- The Member States must ensure that **any intervention affecting protected species is authorised only on the basis of decisions containing precise and adequate reasons** referring to the grounds, conditions and requirements laid down in that article.
- The derogation must be proportionate to the needs which justify it (see judgment in Case [C-217/19](#) Commission v Finland and the case-law cited therein).
- For the competent authorities to make use of the derogations provided for in Article 9 in a way compliant with EU law, the national legislative and regulatory framework must be designed in such a way that (see judgment in Case [C-557/15](#) Commission v Malta):
  - the implementation of the derogating rules complies with the principle of **legal certainty**;
  - **the system of exceptions must be interpreted strictly** and place the burden of proof of the existence of the conditions required for each derogation on the authority taking the decision.

**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 and, as the case may be, the abstract](#) of the judgment is published on the CURIA website on the day of delivery.

Press contact: Jacques Zammit ☎ (+352) 4303 3355.

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

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

<sup>3</sup> [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*.

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

<sup>5</sup> The wild finches considered are: the tree chaffinch *Fringilla coelebs*, the melodious linnet *Carduelis cannabina*, the goldfinch *Carduelis carduelis*, the European greenfinch *Carduelis chloris*, the red-breasted grosbeak *Coccothraustes coccothraustes*, cinereous serin *Serinus serinus* and alder tarin *Carduelis spinus*