Reports of Cases

OPINION OF ADVOCATE GENERAL
SHARPSTON
delivered on 26 July 2017 [1]

Case C-557/15

European Commission
v

Republic of Malta

(Failure of a Member State to fulfil obligations — Conservation of wild birds — Directive 2009/147/EC — Derogation regime allowing the capture of certain species of songbirds)

1. In these infringement proceedings the Commission claims that Maltese legislation which permits the capture of seven species of wild finches [2] contravenes Directive 2009/147/EC ('the Wild Birds Directive') [3] and that the national rules concerned fall outwith the derogation in Article 9(1) of that directive which allows certain species to be captured in certain cases. As requested by the Court, I shall limit myself in this Opinion to examining the interpretation of the condition that 'there is no other satisfactory solution' and of the expression 'judicious use' in Article 9(1)(c) which raises a novel point of law.

The Wild Birds Directive

2. Recitals 3 to 5, 7 and 12 provide:

'(3) A large number of species of wild birds naturally occurring in the European territory of the Member States are declining in number, very rapidly in some cases. This decline represents a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby.

(4) The species of wild birds naturally occurring in the European territory of the Member States are mainly migratory species. Such species constitute a common heritage and effective bird protection is typically a trans-frontier environment problem entailing common responsibilities.

(5) The conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the [Union]'s objectives regarding the improvement of living conditions and sustainable development.

1 Original language: English.

2 Namely: chaffinch (*Fringilla coelebs*), linnet (*Carduelis cannabina*), goldfinch (*Carduelis carduelis*), greenfinch (*Carduelis chloris*), hawfinch (*Coccothraustes coccothraustes*), serin (*Serinus serinus*) and siskin (*Carduelis spinus*). In this Opinion I shall refer to these collectively as 'the seven species'.

3 Directive of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7). That directive codifies Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1), as amended — the directive in force when the terms of Malta's accession to the European Union were agreed and the temporary derogation contained in Annex XI of the Act of Accession was formulated (see point 26 below).

…

(7) Conservation is aimed at the long-term protection and management of natural resources as an integral part of the heritage of the peoples of Europe. …

…

(12) Because of the importance which may be attached to certain specific situations, provision should be made for the possibility of derogations on certain conditions and subject to monitoring by the Commission.'

3. Article 1 states that the directive 'relates to 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' and that 'it covers the protection, management and control of these species and lays down rules for their exploitation'.

4. Article 2 provides that 'Member States shall take the requisite measures to maintain the population of the species referred to in Article 1 at a level which corresponds in particular to ecological, scientific and cultural requirements, while taking account of economic and recreational requirements, or to adapt the population of these species to that level'.

5. Article 5 states that:

'Without prejudice to Articles 7 and 9, Member States shall take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting in particular:

(a) deliberate killing or capture by any method;

…

(e) keeping birds of species the hunting and capture of which is prohibited.'

6. Article 8 prohibits, in respect of the hunting, capture or killing of birds under the Wild Birds Directive, '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)'.

7. One of the prohibited means, arrangements or methods, set out at Annex IV, point (a), fourth indent, is the use of 'nets, traps, poisoned or anaesthetic bait'.

8. Article 9(1) provides as follows:

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

(a)

– in the interests of public safety and health;

– in the interests of air safety;

– to prevent serious damage to crops, livestock, forests, fisheries and water;

– for the protection of flora and fauna;

(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.'

9. In accordance with Article 9(2), the Article 9(1) derogation must specify:

'(a) the species which are subject to the derogations;

(b) the means, arrangements or methods authorised for capture or killing;

(c) the conditions of risk and the circumstances of time and place under which such derogations may be granted;

(d) the authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within what limits and by whom;

(e) the controls which will be carried out.'

10. Article 9(3) requires Member States to send an annual report to the Commission on the implementation of Article 9(1) and (2).

11. Article 9(4) instructs the Commission, on the basis of the information available to it, and in particular the information communicated to it pursuant to Article 9(3), to 'at all times ensure that the consequences of the derogations referred to in [Article 9(1)] are not incompatible with this Directive'. The Commission is required to take 'appropriate steps' to that end.

National law

Legal Notice 253 of 2014

12. Legal Notice 253 of 2014[4] on the Conservation of Wild Birds is an act of general application that sets out the framework for the derogation opening an autumn live-capturing season for finches.

13. Regulation 2(2) of that notice defines a 'live-capturing station' as 'the footprint area within the live-capturing site containing not more than two pairs of horizontal clap-nets per live-capturing station, with each net having an area not larger than 38 square metres, which live-capturing station may be registered on one or more licensee and each pair of clap-nets clearly outlined on the approved site plan'.

4 Legal Notice 253 of 15 July 2014 on the Conservation of Wild Birds (Framework for Allowing a Derogation Opening an Autumn Live-Capturing Season for Finches) Regulations, as amended.

14. Regulation 3(1) provides that 'finches may only be captured by traditional nets known as clap-nets exclusively for the purpose of keeping them in captivity, [5] including for use in fairs and exhibitions, for breeding, and, or [6] use as live-decoys in accordance with the provisions of these regulations'. The remainder of Regulation 3 sets out certain requirements for clap-nets and an obligation to 'ring' captured birds using single-use rings.

15. Regulation 4 provides:

'… the period for an Autumn finch live-capturing season for finches shall be a maximum of seventy-three (73) days from October to December of the same year for which the Minister may decide to open an Autumn finch live-capturing season by means of a notice in the Gazette:

Provided that when opening an Autumn finch live-capturing season, the Minister shall determine that there is no satisfactory solution in terms of Article 9(1) of [the Wild Birds Directive], and take into consideration the maintenance of the population of the species concerned at a satisfactory level, as well as consider the maximum thresholds established in Schedule II:

Provided further that, when establishing the duration of any Autumn finch live-capturing season, the Minister shall establish the overall seasonal bag limit for each of the finch species and the individual seasonal bag limit for each licence, and shall also decide on whether to establish the individual daily bag limit for each licence, to be allowed for that particular Autumn finch live-capturing derogation.'

16. Regulation 5 sets out the requirement to hold an 'Autumn finch live-capturing licence' issued by the competent authority (the Wild Birds Regulation Unit) in order to engage in the capture of the seven species. Holding a licence is subject to the necessary approval of the relevant live-capturing sites and stations.

17. Regulation 8 regulates enforcement during the finch capturing season. It provides for on-the-spot checks by the police and allocates a minimum of seven officers to this task for every 1 000 licences issued.

18. Schedule I consists of a table listing the seven species of finches covered by Legal Notice 253 of 2014. [7]

19. Schedule II provides:

'When establishing the total number of finches which may be live-captured during an Autumn live-capturing season, the Minister shall set the total bag limit at less than 1% of the total annual mortality of the reference population of each species within the territory of the European Union on the basis of latest available scientific data pertaining to ring recoveries.

Provided that the maximum bag limit for an Autumn finch live-capturing derogation shall, in any case, not exceed the following numbers …'

20. In a table that follows directly below, the 'Species National Bag Limit' is laid down as follows: linnet 12 000; goldfinch 800; greenfinch 4 500; siskin 2 350; hawfinch 500; chaffinch 5 000; and serin 2 350.

5 While the English version of that provision refers to the 'purpose of keeping [the birds] in captivity', the Maltese version apparently refers to the 'purpose of breeding' the birds. By virtue of Article 74 of the Maltese Constitution, 'save as otherwise provided by Parliament, every law shall be enacted in both the Maltese and English languages and, if there is any conflict between the Maltese and the English texts of any law, the Maltese text shall prevail'.

6 Sic. The same wording appears in both the Maltese and English versions. It is likely that the draftsman intended either 'and for' or 'and/or'. I do not consider that anything material turns on this point. Later in this text, for the sake of simplicity, I shall cite this text as 'and/or'.

7 That list corresponds to the seven species listed at footnote 2 above.

21. The final paragraph of Schedule II explains that those maximum numbers 'shall be revised and updated by the Minister, by notice in the Gazette, by taking into consideration the conservation status of the seven species concerned and the maintenance of the population of the species at a satisfactory level'.

Legal Notices 250 of 2014, 330 of 2015 and 322 of 2016

22. Legal Notices 250 of 2014,[8] 330 of 2015[9] and 322 of 2016[10] are acts adopted by the Maltese Minister for Sustainable Development, the Environment and Climate Change in order to implement Legal Notice 253 of 2014, the first being adopted on the same day as the act it sought to implement. Regulation 3 of Legal Notice 250 of 2014 sets the dates for the Autumn live-capturing season in 2014 as being from 20 October 2014 to 31 December 2014, both dates included (73 days).

23. Regulation 5(1) of that notice sets the overall seasonal bag limit for the Autumn live-capturing season for 2014 (that is, 'the total number of birds which may be captured under the authority of all issued licences taken together') at precisely the same numbers, for each species, as the (maximum) overall national bag limit laid down by Legal Notice 253 of 2014.

24. Regulation 5(2) of Legal Notice 250 of 2014 states that the Autumn live-capturing licence for 2014 'shall set the live-capturing season's bag limit to ten (10) finches for each Autumn live-capturing licence or however many below this number might have been captured before the season is closed'.

25. Legal Notices 330 of 2015 and 322 of 2016 implement Legal Notice 253 of 2014 to open the Autumn live-capture season for 2015 and 2016 respectively. Their structure, the overall national bag limit and the other arrangements that they put in place were materially identical to those of Legal Notice 250 of 2014.

Facts and procedure

26. Prior to Malta's accession to the European Union in 2004, capture of finches to keep in captivity had long been a traditional activity in that Member State. During its accession negotiations, Malta negotiated and obtained a transitional derogation for finch trapping from the Wild Birds Directive until 31 December 2008. As from 2009, finch trapping was banned in Malta. There is no information before the Court as to whether in fact the practice of capturing finches ceased during that period. It is common ground that Malta began a captive breeding programme which was limited in scope; and that Malta discontinued the captive breeding programme at the end of the transitional period laid down in the Act of Accession.[11]

8 Legal Notice 250 of 15 July 2014: Conservation of Wild Birds (Declaration on a Derogation for a 2014 Autumn live-capturing season for Finches) Regulations. An unexplained nicety is how a Legal Notice bearing the number '250' could 'implement' a Legal Notice of the same date bearing the number '253'.

9 Legal Notice 330 of 16 October 2015: Conservation of Wild Birds (Declaration on a Derogation for a 2015 Autumn live-capturing season for Finches) Regulations.

10 Legal Notice 322 of 7 October 2016: Conservation of Wild Birds (Declaration on a Derogation for an Autumn 2016 Live-capturing Season for Finches) Regulations.

11 Point 10 ('Environment'), D ('Nature Protection'), of Annex XI to the Act of Accession of Malta to the EU (OJ 2003 L 236, p. 33) provides that 'by way of derogation' from Articles 5(a), 5(e), 8(1) and point (a) of Annex IV of Directive 79/409 (the predecessor of the Wild Birds Directive) the seven species of finches may be captured in Malta during the transitional period until 31 December 2008 'exclusively for the purpose of keeping them in captivity'. It contains detailed arrangements for phasing out this activity and putting in place a captive breeding programme. The only trapping of finches envisaged after the expiry of that transitional period was the capture of a limited number of wild specimens 'to ensure sufficient genetic diversity of the captive species'. That number was 'expected to be significantly reduced during the transitional measure'.

27. Prior to elections in March 2013, the then opposition party (Partit Laburista, 'the PL') and the Federation for Hunting and Conservation — Malta ('the FKNK') issued a joint statement promising that if the PL came into power they would work together, inter alia, to apply a 'correct derogation' in respect of the traditional capture of finches in Malta. The PL subsequently won the 2013 elections. In August 2013, the FKNK submitted to the Malta Ornis Committee a proposal to permit the capture of finches under Article 9(1)(c) of the Wild Birds Directive. Subsequently, Malta initiated discussions with the Commission.

28. During the first half of 2014, the Commission held a series of bilateral meetings with Malta. In April 2014, Malta submitted a Technical Memorandum outlining the parameters of its intended derogation.

29. On 16 June 2014, the Commission sent an EU Pilot request to Malta summarising its position. The Commission expressed the view that the intended derogation did not satisfy the conditions in Article 9 of the Wild Birds Directive. On 15 July 2014, Malta nevertheless adopted Legal Notices 250 and 253 of 2014 authorising the capture of finches. On 25 August 2014, Malta replied to the EU Pilot request claiming that the derogation was justified under Article 9(1)(c).

30. On 17 October 2014, the Commission sent Malta a letter of formal notice. On 14 November 2014, Malta replied maintaining its position.

31. On 15 May 2015, Malta sent a report to the Commission on the outcome of the 2014 Autumn 'live-capture' season. That information reinforced the Commission's view that Malta's derogation regime was incompatible with the Wild Birds Directive, since it did not fulfil the conditions of the Article 9 derogation. Malta therefore was in breach of the prohibitions in Articles 5 and 8. On 28 May 2015, the Commission issued a reasoned opinion. On 28 July 2015, Malta replied and reiterated the position set out in its reply to the letter of formal notice.

32. The Commission brought the present action on 30 October 2015 seeking a declaration that:

– by adopting a derogation regime allowing the live-capturing of seven species of wild finches,[12] the Republic of Malta has failed to fulfil its obligations under Articles 5(a) and (e) and 8(1) read in conjunction with Annex IV, point (a), read in conjunction with Article 9(1), of the Wild Birds Directive;

– the Republic of Malta should pay the costs of this action.

33. A hearing was held on 15 February 2017 at which the Commission and Malta presented oral argument.

Arguments of the parties

34. In support of its action the Commission puts forward five pleas, two of which are relevant for the present opinion. First, Malta has failed to demonstrate that there is no other satisfactory solution, as required by the introductory words of Article 9(1). Second, Malta has not demonstrated that the authorised activity constitutes 'judicious use' within the meaning of Article 9(1)(c).

35. Malta insists that its derogation is based on Article 9(1)(c) of the Wild Birds Directive and that it fully complies with that provision.

12 Referred to in footnote 2 above.

Assessment

Preliminary remarks

36. Although this Opinion does not seek to cover all five pleas, I nevertheless think it important to record at the outset certain facts that are not in dispute concerning the Maltese authorisation for the capture of the seven species of finches.

37. First, the overall seasonal bag limit for each species of finch is set in advance of the Autumn live-capturing season and *has been set at precisely the same level for each species in 2014, 2015 and 2016*. It seems intrinsically unlikely that there has been no variation whatsoever in the numbers of finches of the seven species migrating over Malta from one year to another.[13] Second, the overall seasonal bag limit under Maltese law is 27 500 finches.[14] Since more than 4 000 licences are made available and each licence entitles the holder to capture a maximum of 10 finches it follows that — unless all capture is stopped once the overall seasonal bag limit is reached and the enforcement is effective — the total potential capture per season will be more like 40 000 finches rather than 27 500 finches.

38. Third, each licensee is allowed to register one 'live-capturing station' equipped with 'not more than two pairs of horizontal clap-nets per live-capturing station, with each net having an area not larger than 38 square metres'.[15] The total area of net deployed thus appears to be 152 square meters.[16] The Autumn live-capture season lasts for 73 days.[17] Since the total permitted bag is 10 finches per licence that implies that a total net area of 152 square metres is authorised in order to capture an average of just one finch per week over the course of the 73 day Autumn live-capturing season.

39. Finally, while the stated exclusive objective of the capture of birds under the Maltese legislation is keeping them in captivity, it is an integral part of Malta's case that there is no need for capture of wild finches in order to maintain the genetic diversity of the captive-bred birds. For scientific reasons, it is apparently better to import additional captive-bred finches for that purpose.[18] Malta has thus expressly abjured using the Article 9(1) derogation for the specific, limited purpose provided for in its Act of Accession.[19]

40. The Maltese legislation thus manifestly authorises the capture, using the clap-nets, and subsequent keeping of wild birds. Each of those elements is prohibited under Articles 5(a) and (e) and 8(1) read in conjunction with point (a) of Annex IV, of the Wild Birds Directive. Whether Malta is indeed in breach of those provisions depends on whether its legislation meets the strict conditions set out in the Article 9(1)(c) derogation.

41. Those conditions are as follows: (i) there should be no other satisfactory alternative to the activity sought by the derogation; (ii) that derogation should permit 'capture, keeping or other judicious use'; (iii) it should take place under strictly supervised conditions; (iv) on a selective basis; and (v) it should involve only small numbers of birds.

13 Thus, for example, the Commission pointed out that the seasonal bag limit for goldfinch in 2014 (800) was significantly in excess of the estimated total number of specimens of that species that migrated over Malta during the 2014 Autumn live-capture season.

14 See Regulation 5(1) of Legal Notice 250 of 2014 and equivalent provisions in succeeding Legal Notices for 2015 and 2016.

15 See Regulation 2(2) of Legal Notice 253 of 2014.

16 That is: 38 square meters (the area of one net) x 2 (because the nets operate in pairs) x 2 (because there are two pairs of nets per live-capturing station).

17 See Regulation 3 of Legal Notice 250 of 2014 and equivalent provisions in the succeeding Legal Notices for 2015 and 2016.

18 Malta states that the use of imported captive-bred birds proves to be significantly more feasible and effective for ensuring genetic diversity within the captive finch population; and that the captive breeding programme therefore no longer required even limited capture of finches from the wild. Malta based that assessment on various scientific reports which it quotes, notably on a 2010 report by a sub-committee of the Malta Ornis Committee. The Commission agrees with Malta's assessment on this point.

19 See point 26 and footnote 9 above.

42. I state at the outset that in my view, the facts I have just outlined indicate clearly that the Maltese legislation cannot fit within the derogation permitted by Article 9(1)(c) of the Wild Birds Directive.

The Wild Birds Directive — principles of interpretation

43. As Advocate General Ruiz-Jarabo Colomer pointed out, the Wild Birds Directive is based on a disturbing premiss: the decline in the population of a number of wild birds naturally occurring in the European territory of the Member States.[20] That situation represents 'a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby';[21] and 'the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the [EU]'s objectives regarding the improvement of living conditions and sustainable development'.[22]

44. Following the entry into force of the Treaty of Lisbon on 1 December 2009, the principle of 'a high level of protection and improvement of the quality of the environment' set out in Article 3(3) TEU has become a guiding objective of EU law. The same principle is also enshrined in Article 37 of the Charter[23] which — again, following the entry into force of the Treaty of Lisbon — forms part of EU primary law and is to be regarded as an interpretative tool of secondary law.[24]

45. It is settled case-law that where a Member State seeks to rely upon a derogation provided for in EU law, its action falls within the scope of implementation of EU law within the meaning of Article 51 of the Charter, so that the conformity of that action with fundamental rights must be examined by reference to the general principles of EU law, as well as the fundamental rights and principles set out in the Charter.[25]

46. The purpose of the Wild Birds Directive is to protect birds — not to regulate hunting or trapping them. That simple truth needs to be borne in mind when striking the balance between environmental protection — the directive's primary aim — and the various other interests identified in Article 2 of the directive (notably those of an economic or recreational nature).

47. Article 9(1) does not give Member States carte blanche to derogate. It allows them to do so only so far as it is strictly necessary and provided that the other objectives pursued by the directive are not jeopardised.[26] More particularly, Article 9(1) of the Wild Birds Directive cannot be interpreted in a way that turns it into the rule (rather than the exception). To do so would be to render the obligations of principle, laid down in Articles 1 and 2, largely meaningless.[27]

48. It follows that the exercise of interpreting the two key phrases, 'where there is no other satisfactory solution' and 'capture, keeping or other judicious use', should be approached in the manner which best promotes the aim of protection.[28]

20 See Opinion of Advocate General Ruiz-Jarabo Colomer in *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:248, point 5.

21 Recital 3 of the Wild Birds Directive.

22 Recital 5.

23 The Charter of the Fundamental Rights of the European Union (OJ 2012 C 326, p. 2, 'the Charter'). That article lays down an obligation to ensure 'a high level of environmental protection and the improvement of the quality of the environment' and to integrate those objectives into EU policies.

24 See Opinion of Advocate General Jääskinen in *Bund für Umwelt und Naturschutz Deutschland*, C-461/13, EU:C:2014:2324, point 6.

25 See judgments of 26 February 2013, *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraph 21, and of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 74.

26 See, to that effect, judgment of 10 September 2009, *Commission* v *Malta*, C-76/08, EU:C:2009:535, paragraph 58.

27 See, by analogy, judgment of 21 December 2016, *Tele2 Sverige and Watson and Others*, C-203/15 and C-698/15, EU:C:2016:970, paragraph 89.

28 See Opinion of Advocate General Ruiz-Jarabo Colomer in *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:248, point 26.

49. The individual categories of derogation contained in parts (a), (b) and (c) of Article 9(1) are not, as I read them, intended to serve as a basis for a *broad, generalised practice* that derogates from the principle of protection. Rather, they are intended to allow Member States to address precise requirements and specific situations [29] where it is in the general interest that the normal rule (protection of wild birds) should yield to some other pressing requirement. The wording of the 12th recital of that directive confirms that interpretation.

50. As a derogation from the general principles of protection enunciated in the Wild Birds Directive, Article 9 is to be interpreted strictly [30] and a Member State wishing to rely on it must establish that the conditions for its application are met. [31] It is therefore for Malta to provide the necessary evidence to justify its reliance on that derogation. [32]

51. Here, it is important also to recall that Member States are required to ensure that all action affecting protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of the Wild Birds Directive. [33] Without such detailed information concerning all the relevant parameters of a derogation, the Commission would not be able to monitor and ensure the Member State's compliance with that directive 'at all times', as required by Article 9(4).

52. As is apparent from Article 9 itself (which lays down detailed and very restrictive conditions for the operation of the derogation) as well as from the general principle of proportionality, the intended derogation must be proportionate to the needs which justify it. [34] Thus it is settled case-law that the possibility provided for in Article 9 of derogating from the *restrictions on hunting* (and also from other restrictions and prohibitions contained in Articles 5, 6 and 8 of the Wild Birds Directive), is subject to compliance with the precise formal conditions set out in Article 9(2), which are intended to limit derogations to what is strictly necessary and to enable the Commission to supervise them. [35]

53. Against that background, I turn to examine the Commission's first and third pleas.

The first plea: 'no other satisfactory solution'

54. The Commission contends that Malta has failed to establish that there is 'no other satisfactory solution', within the meaning of Article 9(1) of the Wild Birds Directive, to trapping wild finches in order to address the 'problem' or 'specific situation' which the Maltese legislation is intended to resolve, namely acquiring finches to keep in captivity. In particular, Malta has not demonstrated that captive breeding is not a satisfactory alternative solution.

55. Malta argues that, on the contrary, there was no other satisfactory solution.

56. In these infringement proceedings, the Commission and Malta are in fundamental disagreement as to the actual purpose underlying the Maltese derogation for trapping finches. Whilst the Commission submits that the derogation permits capture of finches exclusively for the purpose of keeping them in captivity for various recreational uses, Malta claims that the purpose also includes capture as an end in itself.

29 See judgments of 8 July 1987, *Commission* v *Belgium*, 247/85, EU:C:1987:339, paragraph 7, and of 7 March 1996, *Associazione Italiana per il WWF and Others*, C-118/94, EU:C:1996:86, paragraph 21.

30 See judgment of 17 February 2011, *The Number (UK) and Conduit Enterprises*, C-16/10, EU:C:2011:92, paragraph 31.

31 See judgment of 10 September 2009, *Commission* v *Malta*, C-76/08, EU:C:2009:535, paragraph 48.

32 See judgment of 16 September 1999, *Commission* v *Spain*, C-414/97, EU:C:1999:417, paragraph 22.

33 See judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 34.

34 See judgment of 10 September 2009, *Commission* v *Malta*, C-76/08, EU:C:2009:535, paragraph 57.

35 See judgment of 7 March 1996, *Associazione Italiana per il WWF and Others*, C-118/94, EU:C:1996:86, paragraph 21.

57. The Court eschews interpreting national law in the context of a reference for a preliminary ruling.[36] However, the very nature of the infringement procedure requires the Court to assess whether, by introducing or maintaining in force particular national laws, the Member State has failed to comply with its obligations under EU law.

58. A natural reading of the Maltese legislation indicates that the purpose of the derogation is that presented by the Commission.

59. First, as is clear from settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation prevailing in the Member State at the end of the period laid down in the reasoned opinion.[37] The relevant national legal framework is therefore that pertaining as a result of the laws and regulations in force at that moment.

60. Second, in an infringement procedure the Court should base its analysis first and foremost on the literal reading of the terms of the national laws.[38] Here, I note that it is beyond dispute that Legal Notice 253 of 2014, which forms the basis for the derogation, was promulgated in order to allow the capture of finches 'exclusively for the purpose of keeping them in captivity, [[39]] including for use in fairs and exhibitions, for breeding, and/or use as live-decoys in accordance with the provisions of these regulations'.

61. Essentially the same description is to be found in the official 2014 Technical Memorandum prepared by the Maltese Wild Birds Regulation Unit; that description also matches, essentially, the introductory terms of Point 10 ('Environment'), D ('Nature Protection'), of Annex XI to the Act of Accession.[40] Finally, it is striking that the FKNK (one of the two promoters of the reintroduction of finch trapping)[41] confirmed in its Memorandum on Trapping of July 2012 that the practice of finch trapping is intended '*for the sole purpose of keeping birds alive for their song, decoying and breeding in captivity*'. Nothing, therefore, in those contemporary documents begins to suggest that the Maltese legislation was introduced with a view to allowing trapping as an aim in itself.

62. Third, in accordance with the existing case-law, the Court may only exceptionally go beyond the literal terms of the national provisions. That is notably the case where the jurisprudence of national courts means that the terms of national law are to be interpreted in a particular way.[42] That is not, however, the situation here.

63. The explanations Malta puts forward as to how national law should be interpreted do not seem to correspond to the actual wording of the relevant provisions of the legislation. They seem, on the contrary, to be *contra legem*.

36 See to that effect judgment of 23 April 2009, *Angelidaki and Others*, C-378/07 to C-380/07, EU:C:2009:250, paragraph 48.

37 See, inter alia, judgment of 26 April 2005, *Commission* v *Ireland*, C-494/01, EU:C:2005:250, paragraph 29.

38 See judgment of 13 December 2007, *Commission* v *Ireland*, C-418/04, EU:C:2007:780, paragraph 269 et seq.

39 Or perhaps 'breeding': see footnote 5 above.

40 Whilst the English version of Legal Notice 253 and the Technical Memorandum reflect, word for word, the terms of Point 10 ('Environment') D ('Nature Protection') of the English text of Annex XI to the Act of Accession, the Maltese version of Legal Notice 253 contains a slightly different expression (see footnote 5). As will become apparent later, that slight discrepancy does not affect the conclusions that I reach.

41 See point 27 above: the other promoter was the PL, which went on to win the 2013 election and form a government.

42 According to that case-law, the scope of national laws, regulations or administrative provisions must be assessed in the light of the interpretation given to them by national courts (see, particularly, judgment of 9 December 2003, *Commission* v *Italy*, C-129/00, EU:C:2003:656, paragraph 30 and the case-law cited). Moreover, where national legislation has been the subject of different relevant judicial constructions, some leading to the application of that legislation in compliance with EU law, others leading to the opposite application, it must be held that, at the very least, such legislation is not sufficiently clear to ensure its application in compliance with EU law (see paragraph 33).

64. In examining the first plea, I shall therefore proceed on the basis that the Maltese legislation is to be taken at face value — that is, as being intended to allow the live-capture of finches exclusively for the purpose of keeping them in captivity, including for use in fairs and exhibitions, for breeding, and/or use as live-decoys. For the sake of completeness, I shall then briefly examine the first plea from the perspective advanced by Malta.

Capture exclusively for the purpose of keeping

65. It follows from the introductory words to Article 9(1)(c) of the Wild Birds Directive that derogation under that provision is permitted only 'where there is no other satisfactory solution' for the activity identified as an issue to be addressed by that derogation.[43] This phrase in the introduction to Article 9(1) serves as a gatekeeper to limit access to the specific grounds for derogation that are then listed in (a), (b) and (c).

66. The term 'satisfactory solution' is an EU law concept which must be interpreted independently. In this respect, I agree with Advocate General Fennelly, who opined that 'the term "satisfactory" may be interpreted as meaning a solution which resolves the *particular problem* facing the national authorities, and which at the same time respects as far as possible the prohibitions laid down in the Directive; a derogation may only be allowed where no other solution which does not involve setting aside these prohibitions can be adopted'.[44]

67. The Member State must genuinely explore and assess whether there *is* 'no other satisfactory solution' to address the activity in question. In that respect, I agree with the Commission that the Member State must first demonstrate the existence of a specific purpose that underpins its reliance on the derogation. I draw here attention to the helpful methodology that the Commission has developed with regard to hunting derogations in its (non-binding) Guide to Sustainable Hunting[45] — a methodology to which Malta subscribes, as it expressly stated in its defence.

68. Next, I do not think that a Member State may define the problem that it seeks to address artificially so as to exclude other potential satisfactory solutions. Rather, it has to demonstrate the absence of such alternative solutions by reference to objective data amenable to monitoring by the Commission and consequently to a judicial review by the Court.[46] It is only where, taking into account all the circumstances of the case and respecting the objectives of the Wild Birds Directive, there truly is *no alternative solution* to meet the legitimate aim that the Member State identifies that it may rely upon one of the Article 9(1) categories of derogation.

69. The use of the term 'satisfactory' implies that Article 9(1) of the Wild Birds Directive does not require that the solution be perfect or necessarily exactly equivalent to the historical, traditional solution for the situation it seeks to address. The new solution may involve a degree of inconvenience or require those concerned to adapt their practices.

70. The approach that I espouse is confirmed by the case-law.

43 See, to that effect, judgments of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 15, and of 9 June 2005, *Commission* v *Spain*, C-135/04, EU:C:2005:374, paragraph 18.

44 See Opinion of Advocate General Fennelly in *LRBPO and AVES*, C-10/96, EU:C:1996:430, point 33 (emphasis added).

45 See Section 3, p. 41 et seq. That methodology requires, as a preliminary condition for introducing a derogation, that an exact problem for which a solution is sought be identified. It provides for the following stages: (i) the identification and definition of the precise problem for which a solution is being sought; (ii) the identification of potential alternative solutions to the said problem; (iii) ascertaining the applicability of Article 9 of the directive to such alternative solutions; and (iv) subjecting potential alternative solutions to the 'satisfactory solution test'. The Guide to Sustainable Hunting is available via the following link: http://ec.europa.eu/environment/nature/conservation/wildbirds/hunting/docs/hunting_guide_en.pdf.

46 See points 49 to 52 above.

71. Thus, in *LRBPO and AVES*[47] the Belgian Conseil d'État referred two questions which bear directly on the present proceedings. It asked whether Articles 5, 9 and 18 of the Wild Birds Directive could be relied upon to permit a Member State to take account of the fact that the prohibition on capturing birds for recreational purposes would compel numerous bird fanciers to alter their installations and to abandon certain established habits where that State recognised that breeding was possible but was not yet feasible on a large scale.

72. The material before the Court in that case showed that breeding and reproduction in captivity of the species in question was not only scientifically and technically feasible, but had already been carried on successfully by certain breeders. In those circumstances the Court held that 'breeding and reproduction in captivity could be regarded as *not* constituting an "other satisfactory solution" only if it were established that, were it not for the capture of birds in the wild, those activities could not prosper. Consequently, the fact that the breeding and reproduction in captivity of the species concerned are not yet feasible on a large scale by reason of the installations and the *inveterate habits of bird fanciers*, habits which, moreover, have been encouraged by domestic rules derogating from the general scheme of the Directive, is *not in itself such as to cast doubt on the satisfactory nature of the alternative solution* to capturing birds in the wild'.[48]

73. From the facts before the Court, it is clear that the Court's ruling in *LRBPO and AVES*[49] can be transposed to the present infringement proceedings. I consider it to be clear beyond argument that what the Court there held in relation to bird fanciers stocking their aviaries applies equally to the keeping of the seven species of finches in captivity i.e., as song-birds, 'including for use in fairs and exhibitions, for breeding, and/or use as live-decoys', as laid down in Legal Notice 253 of 2014. A captive breeding programme *is* an alternative solution (that is, an alternative way of procuring finches to keep in captivity). Malta cannot therefore invoke the Article 9(1) derogation.

74. Let me now briefly address certain specific arguments advanced by Malta in its defence.

75. Malta's argument that it never agreed that the captive breeding programme described in Annex XI to the Act of Accession would be a satisfactory solution cannot alter that conclusion. It is settled case-law that neither individual statements of position nor joint declarations of the Member States may be used for the purpose of interpreting a provision where their content is not reflected in its wording and therefore has no legal significance.[50] That is precisely the situation here.

76. Next, Malta claims that captive breeding is not a satisfactory alternative given that a combination of bio-geographical factors effectively rules out introducing wild-caught finches into the captive breeding programme in order to maintain genetic diversity (thereby accepting that Malta's captive breeding programme would no longer require even limited capture of finches from the wild). On Malta's own argument therefore, it follows that the necessary genetic diversity of captive-bred stock can be ensured through means which do not require any derogation from the Wild Birds Directive.

77. Similarly, Malta's reliance on paragraph 56 of the earlier *Commission* v *Malta* ruling is not capable of altering the position.[51]

47 Judgment of 12 December 1996, C-10/96, EU:C:1996:504.

48 Paragraphs 20 and 21 (emphasis added).

49 Judgment of 12 December 1996, C-10/96, EU:C:1996:504.

50 See, to that effect, judgments of 26 February 1991, *Antonissen*, C-292/89, EU:C:1991:80, paragraph 18; of 13 February 1996, *Bautiaa and Société française maritime*, C-197/94 and C-252/94, EU:C:1996:47, paragraph 51; and of 3 December 1998, *KappAhl*, C-233/97, EU:C:1998:585, paragraph 23.

51 Judgment of 10 September 2009, C-76/08, EU:C:2009:535. In that case the alternative solution identified by the Commission offered such limited possibilities of pursuing the activity sought (hunting) that the Court considered that it could 'upset the balance sought by the Directive between the protection of species and certain leisure activities'. In the present case, however, it is clear that the keeping of birds can be successfully sustained thanks to a captive breeding programme of sufficient scale.

Capture as an end in itself

78. For the sake of good order, I turn now to considering briefly the first plea from the perspective now advanced by Malta, namely that the derogation is really also for the purpose of 'capture as an end in itself' and that 'the captive breeding programme … failed to provide a satisfactory alternative to the indispensable live-capturing element of the activity'. Malta claims that the latter constitutes a deeply rooted traditional way of life for finch trappers, whose passion cannot be satisfied by acquiring captive-bred finches.

79. First, it is important to state that no need has been advanced for framing the derogation from the strict conservation regime laid down by the Wild Birds Directive so as to ensure that *every* finch that is kept in captivity is a finch that was captured from the wild by a traditional hunter using clap-nets. Given the relatively large numbers of finches involved, an alternative solution would prima facie be to supply the greater part of the demand for finches to keep in captivity from a captive breeding programme and to limit trapping (to satisfy the traditional desire for the live-capture of finches) to a much smaller number of birds. Second, it is already clear from established case-law that the Article 9(1) derogation cannot be used to extend *permitted* hunting unnecessarily. [52]

80. Third, to the extent that capture-as-an-end-in-itself is asserted to be the purpose of the legislation, an alternative solution would be a (much more limited) programme of capture, scientific ringing and live release. Malta itself recognises that that solution does address the capture element of the twin aims of the legislation, but rejects it because 'capture, ring and release' does not simultaneously address the keeping element. [53] As I have explained, however, it is plain beyond doubt that the keeping element can be addressed satisfactorily through a captive-breeding programme. [54]

81. Fourth, there is no material before the Court to suggest that 'capture, ring and release' would not be a satisfactory alternative solution. Objectively, it seems plausible to think that 'capture, ring and release' of a much more limited number of birds for strictly scientific purposes would allow trappers to continue to derive pleasure from exercising their skills to trap birds whilst reducing significantly the negative impact on bird conservation. The fact that trappers would no longer have the financial incentive which presently results, in particular, from the resale of captured specimens is immaterial. In its written pleadings, Malta explained that every bird currently caught is already required to be ringed. Against that background, it seems plausible to think that the necessary skills for scientific ringing could therefore be taught to finch trappers. I do emphasise, however, that so far as I can see the use of traditional clap-nets could form no part of such an arrangement. [55]

82. A further alternative solution might perhaps be the limited live capture (using other methods) of species of birds listed in Annex II to the Wild Birds Directive, i.e. the birds which may be hunted under the conditions laid down in Article 7 thereof. In this respect, I shall content myself with observing that the test for whether an alternative solution exists must rest on objective, explicit

52 See judgments of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 16; of 9 June 2005, *Commission* v *Spain*, C-135/04, EU:C:2005:374, paragraph 19; and of 10 September 2009, *Commission* v *Malta*, C-76/08, EU:C:2009:535, paragraph 50.

53 See Technical Memorandum, Part B, p. 3. Malta's position was reiterated by the agent for Malta during the hearing.

54 See point 73 above.

55 See point 38 above; see further point 102 and footnote 72 below.

criteria;[56] that there is no evidence before the Court to the effect that permitted capture under strictly supervised conditions does not represent an alternative solution;[57] and that I do not read *Commission* v *Finland* as providing any comfort for Malta's position that live-capture must involve finches.[58]

83. Finally, I can find no justification for the proposition that only a solution that is *not* viewed with disfavour by the current live-capturing community qualifies as an alternative solution within the meaning of Article 9(1) of the Wild Birds Directive. On the contrary: the established case-law is clear that the existence of 'inveterate habits' does not of itself justify having recourse to the Article 9(1) derogation.[59]

84. I conclude that Malta has not demonstrated that there is no other solution and that the Commission should succeed in its first plea.

Third plea: 'judicious use'

85. The Commission claims that the Maltese derogation does not fall within the concept of 'judicious use' for the purposes of Article 9(1)(c) of the Wild Birds Directive.

86. The *Oxford Dictionary*[60] defines 'judicious' as 'having, showing or done with good judgement or sense, careful and sensible'. *Langenscheidt*[61] gives a very similar definition of the term 'vernünftig' used by the German version of the Wild Birds Directive. In many linguistic versions, the equivalent word for 'use' in the phrase 'judicious use' has an exploitative connotation.[62] However, in its Guide to Sustainable Hunting the Commission observes (to my mind rightly) that 'any exploitative connotation carried by the term "use" needs to be balanced by the connotations of responsibility, restraint and good judgement imparted by the term "judicious"'.[63]

87. Next, it is clear that whereas Article 9(1)(a) and (b) identify *specific* (and, I would say, obvious) *situations* in which it will be appropriate to derogate from the otherwise strict prohibitions on killing or capturing wild birds, Article 9(1)(c) is framed less prescriptively and serves to authorise 'capture, keeping or other judicious use'. There may be a temptation to seek to expand the meaning of that phrase and to treat it as a convenient 'get out clause'. I am clear that there is no good reason why (c) should be read in a different way than from (a) or (b) and that therefore such a temptation is to be resisted. The EU legislature's intention cannot have been that every existing practice can be swept up under the convenient label of 'capture, keeping or other judicious use', because to do so would undermine the whole purpose of the Wild Birds Directive.

56 See points 66 to 69 above.

57 However, I should also point out that there is no material before the Court to indicate that any of these species are in fact to be found in Malta in sufficient numbers for such a hunting derogation to be permissible under the Wild Birds Directive.

58 See judgment of 15 December 2005, C-344/03, EU:C:2005:770, paragraph 44. In that case the Court held that hunting of Annex-II birds by way of replacement for hunting certain other Annex-II birds would risk rendering Article 9(1)(c) of the Wild Birds Directive nugatory, at least partially. It is clear that that case turned on its particular facts and is not relevant in the present context.

59 Judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 21. More generally, a Member State may not plead the local inhabitants' opposition in order to justify a failure to comply with obligations laid down by the EU law (see, to that effect, judgment of 4 March 2010, *Commission* v *Italy*, C-297/08, EU:C:2010:115, paragraphs 81 to 85).

60 See online https://en.oxforddictionaries.com/.

61 See online https://de.langenscheidt.com/.

62 See the following linguistic versions: SK: využívanie; PL: wykorzystywania; NL: gebruik; FR: exploitation; ES: explotación; DE: Nutzung; CZ: využívání; RO: utilizări.

63 See point 3.5.25.

88. Sometimes, 'because of its nature and scope, [a derogatory] regime is incompatible with the protective objectives pursued by the Directive'.[64] It follows that not everything that a Member State may wish to authorise can necessarily be brought under the heading of 'capture, keeping or other judicious use' and thus be fitted within the Article 9(1)(c) derogation.

89. I have already made reference to some aspects of the Court's case-law on the interpretation of the Article 9(1) derogation. It is appropriate to continue that exercise now.

90. First, the Court stated as early as 1987 that 'the capture and sale of birds … with a view to keeping them for use as live decoys or for recreational purposes in fairs and markets may constitute judicious use authorised by Article 9(1)(c)'[65] (without, however, explaining why that was so). In subsequent cases, the Court has similarly without further analysis accepted either implicitly[66] or explicitly that 'the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Directive'[67] or capture for recreational purposes, such as that intended to enable fanciers to stock their aviaries, and for the purpose of obviating the problems of consanguinity in bird breeding for recreational purposes,[68] may also constitute judicious use within the meaning of Article 9(1)(c).

91. Second, it is settled case-law that the competent authorities may only authorise capture of the number of birds 'objectively necessary' to attain the desired purpose and that there is an overriding requirement that the maximum limit of 'small numbers' of birds, expressly referred to in Article 9(1)(c), be respected.[69]

92. Third, in two cases concerning birds listed in Annex II the Court found that the derogations under Article 9 of the directive may be granted only if it is ensured that the population of the species concerned is maintained at a satisfactory level. If that condition is not fulfilled, hunting of birds cannot, in any event, be considered judicious and, accordingly, acceptable for the purposes of the 11th recital of the Wild Birds Directive.[70] That case-law is *a fortiori* relevant in the present context, which involves birds not listed in Annex II.

93. Fourth, as early as 1987 the Court also made it clear that, *if* 'there is no guarantee that the capture of certain species of birds will be limited to the strict minimum … or that the means, arrangements or methods for capture are not large-scale, non-selective or capable of causing the local disappearance of a species', the 'essential elements' of Article 9 are not satisfied.[71]

64 See judgment of 12 July 2007, *Commission* v *Austria*, C-507/04, EU:C:2007:427, paragraph 187.

65 See judgment of 8 July 1987, *Commission* v *Italy*, 262/85, EU:C:1987:340, paragraph 38.

66 See judgment of 7 March 1996, *Associazione Italiana per il WWF and Others*, C-118/94, EU:C:1996:86, where the Court seems without further analysis implicitly to have accepted the proposition that, provided its national legislation *did* define the derogation in sufficient detail, a Member State could use the Article 9 derogation to authorise hunting both of birds listed in Annex II and of birds not there listed. What the Court actually held was that 'Article 9 … is to be interpreted as meaning that it authorizes the Member States to derogate from the general prohibition on hunting protected species … *only by measures which refer in sufficient detail* to the factors mentioned in Article 9(1) and (2)' (emphasis added).

67 See judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 10, where the Court relied on the combination of *Commission* v *Belgium* (see judgment of 8 July 1987, 247/85, EU:C:1987:339, the parallel case to judgment of 8 July 1987, *Commission* v *Italy*, 262/85, EU:C:1987:340; the wording of those two judgments is not identical but the reasoning is broadly similar) and *Associazione Italiane per il WWF and Others* (judgment of 7 March 1996, C-118/94, EU:C:1996:86) and *Commission* v *Italy* (judgment of 8 July 1987, 262/85, EU:C:1987:340) as 'clear' authority. I confess that I find that element of the judgment not entirely easy to follow.

68 Judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 22.

69 Judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 26.

70 See judgments of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 32, and of 10 September 2009, *Commission* v *Malta*, C-76/08, EU:C:2009:535, paragraph 59.

71 Judgment of 8 July 1987, *Commission* v *Italy*, 262/85, EU:C:1987:340, paragraph 39.

94. Finally, I emphasise that all the cases that I have reviewed related to periods prior to the entry into force of the Treaty of Lisbon, with its emphasis on a 'high level' of protection of the environment — a principle echoed in Article 37 of the Charter, which now has the status of primary law. The present proceedings, however, fall to be decided against that (new) background.

95. The application of that case-law to Malta's legislation leads me to the conclusion that the latter is manifestly irreconcilable with the condition of 'judicious use'.

96. In arguing that an overall seasonal bag limit of 27 500 finches is 'judicious use', Malta conflates two objectives. To the extent that the objective is, as the legislation itself expressly states, '*exclusively*' to acquire finches for keeping in captivity i.e., as song-birds, 'including for use in fairs and exhibitions, for breeding, and/or use as live-decoys', *that use* can be addressed — as I have explained when examining the first plea — through a captive breeding programme, which constitutes another satisfactory solution.

97. It is common ground that the estimated total number of finches currently already in captivity lies somewhere between 20 000 and 40 000. Given the natural mortality of birds in captivity, a certain number of birds will need to be acquired on a continuing basis in order to sustain that population, either through trapping or through promoting a sufficiently large-scale captive-breeding programme. It does not require great perspicacity to see that, with the passage of time, the need to address the problem of sustaining the desired number of birds in captivity would become more acute.

98. However, none of that, of itself, serves to justify resuming authorising finch-trapping when promoting a large scale captive breeding programme would serve satisfactorily to sustain the tradition which the Maltese legislation ostensibly seeks to safeguard, namely keeping finches for various recreational purposes. Despite that obvious fact, Malta declared the national captive breeding programme put in place in accordance with the Act of Accession a failure and discontinued it as from 2009.

99. It also seems inherently implausible that it is necessary to *add 27 500 finches to that 'stock' on an annual basis* in order to replace finches that have succumbed during the year and to satisfy new demand for captive finches for recreational purposes. That statement holds good whether the additional finches be acquired through a captive breeding programme or through trapping. I refrain from making any suggestion as to what the fate is of those finches captured that are not, in fact, required for the stated exclusive purposes identified in the legislation authorising their trapping.

100. To the extent that the objective is *capture as well as keeping*, I point out that nothing in the material before the Court explains why it is 'judicious use' — in the sense of objectively necessary — to authorise the *capture* of the numbers specified by the overall seasonal bag limit (27 500 finches), given that the legislation also identifies, as the *exclusive subsequent use* of the finches captured, a use for which it is very doubtful that so many finches are in fact required on an annual basis and for which, moreover, another satisfactory solution exists. As the Member State seeking to rely on the derogation under Article 9(1) of the Wild Birds Directive, it is for Malta to make good its reliance on that provision. It must do so against the background that the guiding principle is now that there must be a high level of environmental protection. I consider that it has wholly failed to discharge that burden.

101. There is one further issue that should be mentioned.

102. If the aim is live capture of a bird, it is likely that a net of some kind will have to be used. It is true that Article 9 permits derogation from Article 8(1) of the directive, and hence from the otherwise absolute prohibition on using nets contained in point (a) of Annex IV.[72] However, the actual method of capture authorised by the Maltese legislation involves the use of clap-nets. I have described these nets earlier in this Opinion.[73] It seems to me that, prima facie, such nets are a method for capture that is both large-scale and non-selective. To the extent that finches tend to fly in flocks, it is plausible that significant numbers of finches will be caught in the net simultaneously.[74] Even if the 'surplus' finches are immediately released, as Malta submits, that does not seem to me sufficient to conclude that the method of trapping used ceases to be either 'large-scale' or 'non-selective'. It is also plausible that at least some will suffer stress from the experience and may not survive.[75] In these circumstances, I strongly doubt that Malta can demonstrate that the populations of the seven species of finch can be maintained at a satisfactory level, as required by the case-law. It may even be that there is some risk — I make no attempt to evaluate the possible extent of such a risk — that the use of such nets by 4 000 licence holders over a hunting season of 73 days may, potentially, be 'capable of causing the local disappearance of a species'.

103. The material placed before the Court by Malta makes no attempt to address any of these issues: the emphasis is placed instead on the fact that the use of clap-nets is 'traditional'. But that is to miss the point. If the use of clap-nets produces such a result — and it is for Malta to show that it does *not* — the 'essential elements' of Article 9 are not satisfied (see *Commission* v *Italy*[76]). I merely add that, from a purely linguistic perspective, I would also find it difficult to see how the use of a method of capture that was both large-scale and non-selective could possibly fall within the concept of 'judicious use'.

Closing remarks

104. I should like to conclude by highlighting two issues that arise from my general study of the pleadings in this case and which are relevant to certain other aspects of Article 9(1)(c) and then offering a final observation.

105. First, I have serious doubts as to the credibility of the methodology used by Malta in order to establish the reference population for the purpose of calculating the condition of 'small numbers'. I note that, instead of relying on a systematic monitoring system, Malta based its calculations on a single study conducted in 2007[77] relating to a very limited sample (112) of ring recoveries. As a result, very limited ring recoveries in Malta from birds of the seven species from other Member States were used to calculate, as the reference group for the overall seasonal bag limit,[78] the entire breeding populations of each species in those Member States (amounting to millions of birds in some cases), without any further proof as to the extent to which those populations in fact migrate through Malta.

72 Annex IV lists 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'.

73 See point 38 above.

74 See to this effect scientific research by Raine, A.F., *The international impact of hunting and trapping in the Maltese islands*, May 2007, p. 22.

75 The scientific research proves that capture and captivity can induce in birds some form of chronic stress and that birds can retain the effects of those stressors even after quickly being returned to their natural habitat. See to that effect Dickens, M., Delehanty, D., and Romero, L., 'Stress and translocation: alterations in the stress physiology of translocated birds', *Proceedings of the Royal Society B: Biological Sciences*, 276, 2009, pp. 2051-2056; available via the following link: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2677253/.

76 Judgment of 8 July 1987, 262/85, EU:C:1987:340, paragraph 39.

77 See Raine, A.F., *The international impact of hunting and trapping in the Maltese islands*, May 2007.

78 Schedule II to Legal Notice 253 of 2014 instructed the Minister to 'set the total bag limit at less than 1% of the total annual mortality of the reference population of each species within the territory of the European Union on the basis of *latest available scientific data* pertaining to ring recoveries' (emphasis added; see point 27 above).

It is difficult to regard that as a sound scientific approach to assessing the impact which licensing live trapping in Malta might, or might not, have either on those populations as a whole or on the sub-population of birds migrating over Malta; or to reconcile that approach with the precautionary principle.[79]

106. Second, I recall that Article 9(1)(c) allows Member States to permit capture, keeping or other judicious use of 'certain birds' in 'small numbers' and 'under strictly supervised conditions'. Assessing whether those essential supplementary conditions — which go to the proportionality of the derogation — are met is beyond the scope of this Opinion. Suffice it to say that I entertain significant doubts as to whether the contested arrangements (in particular given the features that I have highlighted at point 38 above) satisfy those additional requirements and are proportionate. I have, in any event, already concluded that the Commission's first and third pleas in law should be upheld. If the Court agrees with that analysis, it will not require embarking upon a detailed factual analysis of the proportionality of the contested arrangements.

107. Finally, much has been made during these proceedings of the traditional aspects of finch capture and the need to respect traditional usages. In concluding, it may perhaps be helpful to offer a hypothetical illustration to show how cultural diversity and the requirements of EU law can coexist rather than be at loggerheads.

108. Suppose that, in a candidate country for accession to the European Union, there is a deep-rooted local tradition that every young girl, on the Sunday closest to her 18th birthday, should attend Mass wearing a necklace made of the display feathers from a particular bird. Six birds are needed to furnish enough feathers for one necklace. Prior to EU accession, no legislation prohibited that practice. After accession, the birds are in principle protected under the Wild Birds Directive. Can the new Member State derogate under Article 9(1), classifying its traditional practice as 'judicious use', in order to authorise the status quo to continue indefinitely?

109. First, it is clear that in general terms another satisfactory alternative does exist. The traditional feather necklace can be passed on from one young girl to another, rather than be created new for each 18 year old. Second, it is likely that if feather necklaces are passed on in that way, they will become worn and shabby over time and will occasionally need to be replaced. It *would* be possible to make use of the Article 9(1)(c) derogation in order occasionally to capture a small number of birds in order to make a replacement feather necklace.

110. In suggesting that the Commission's first and third pleas are well founded, I do not propose a solution that rides roughshod over either tradition or cultural diversity within the European Union. To the extent that the Maltese wish to keep singing finches in captivity, that desire can be met through the alternative solution of the captive breeding programme. To the extent that Maltese bird trappers wish to exercise and test their skills as hunters, they can be authorised to capture small numbers of individual birds by *methods that do not involve the use of clap-nets*, strictly respecting best ornithological practices, and the birds so caught can be ringed and then carefully released back into the wild. Provided traditions evolve, there is no insurmountable conflict. I am, however, entirely convinced that the present arrangements do not respect Malta's obligations under EU law.

79 In accordance with Article 191(2) TFEU, the EU policy on the environment 'shall aim at a high level of protection' and be based on the precautionary principle.

Conclusion

111. In the light of all the foregoing considerations I am of the view that the Commission should succeed in its first and third pleas. It follows that, irrespective of the outcome of the second, fourth and fifth pleas, I consider that the Court should:

(1) rule that by introducing, for the purpose of live capture of seven species of finches, a derogation that does not meet the conditions of Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, the Republic of Malta has failed to fulfil its obligations under Articles 5(a) and (e), and 8(1) in connection with point (a) of Annex IV to that directive;

(2) order Malta to pay the costs.