

JUDGMENT OF THE COURT (Third Chamber)

21 June 2018 (*)

(Failure of a Member State to fulfil obligations — Directive 2009/147/EC — Conservation of wild birds — Live-capturing and keeping — Species belonging to the finch family — Prohibition — National derogation regime — Member States' power of derogation — Conditions)

In Case C-557/15,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 30 October 2015,

European Commission, represented by K. Mifsud-Bonnici and C. Hermes, acting as Agents, with an address for service in Luxembourg,

applicant,

v

Republic of Malta, represented by A. Buhagiar, acting as Agent, and by J. Bouckaert, advocaat, and L. Cassar Pullicino, avukat,

defendant,

THE COURT (Third Chamber),

composed of L. Bay Larsen (Rapporteur), President of the Chamber, J. Malenovský, M. Safjan, D. Šváby and M. Vilaras, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 15 February 2017,

after hearing the Opinion of the Advocate General at the sitting on 26 July 2017,

gives the following

Judgment

- 1 By the present action, the European Commission asks the Court to declare that, by adopting a derogation regime allowing the live-capturing of seven species of wild finches (Chaffinch *Fringilla coelebs*, Linnet *Carduelis cannabina*, Goldfinch *Carduelis carduelis*, Greenfinch *Carduelis chloris*, Hawfinch *Coccothraustes coccothraustes*, Serin *Serinus serinus* and Siskin *Carduelis spinus*), the Republic of Malta has failed to fulfil its obligations under Article 5(a) and (e), and 8(1) in connection with point (a) of Annex IV of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7), read in conjunction with Article 9(1) of that directive.

Legal context

European Union law

2 Article 2 of Directive 2009/147 provides:

‘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.’

3 Article 5(a) and (e) of that directive is worded as follows:

‘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.’

4 Article 7(1) and (4) of the Directive provides:

‘1. Owing to their population level, geographical distribution and reproductive rate throughout the Community, the species listed in Annex II may be hunted under national legislation. Member States shall ensure that the hunting of these species does not jeopardise conservation efforts in their distribution area.

...

4. Member States shall ensure that the practice of hunting, including falconry if practised, as carried on in accordance with the national measures in force, complies with the principles of wise use and ecologically balanced control of the species of birds concerned and that this practice is compatible as regards the population of these species, in particular migratory species, with the measures resulting from Article 2.

They shall see in particular that the species to which hunting laws apply are not hunted during the rearing season or during the various stages of reproduction.

In the case of migratory species, they shall see in particular that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds.

...’

5 The seven species of wild finches referred to in paragraph 1 of the present judgment do not appear in Annex II to Directive 2009/147.

6 Article 8(1) of Directive 2009/147 provides:

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

7 The fourth indent of point (a) of Annex IV to that directive mentions the following means:

‘– nets, traps, poisoned or anaesthetic bait’.

8 Article 9(1) and (2) of the Directive provides:

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

...

(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.

2. The derogations referred to in paragraph 1 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.

...’

Maltese law

Conservation of Wild Birds Regulations

9 Legal Notice 79 of 29 March 2006 contains the Regulations on the preservation of wild birds and constitutes the main legal act transposing Directive 2009/147 in Maltese law (‘Conservation of Wild Birds Regulations’).

10 In particular, Regulation 9 of the Conservation of Wild Birds Regulations transposes, in essence, Article 9 of Directive 2009/147 and fixes the conditions to be used for the assessment of derogations. Regulation 9 also makes arrangements for a specific decision-making procedure which must be followed during the assessment of such a derogation, and includes a mandatory review by the Maltese Ornithology Committee (‘the Ornithology Committee’).

11 Regulation 10 of the Conservation of Wild Birds Regulations sets out the role of the Ornithology Committee. That role consists in particular, pursuant to Regulation 10(6)(c), in ‘mak[ing] recommendations to the Minister on the authorization of derogations from the provisions of regulations 4, 5, 6, 7, 18 and 21’ and ‘verify[ing] at regular intervals that the conditions governing the granting of such authorization or authorizations continue to be fulfilled’. The fourth condition of that paragraph also lays down, with precision, the power of the Minister for the Environment, Sustainable Development and Climate Change (‘the Minister’), when examining the recommendations of the Ornithology Committee, to decide whether or not to authorise the derogations, and his obligation to state in writing the reasons for his decision in case of substantial differences between the recommendations of the Ornithology Committee and his decision.

12 Regulation 27 of the Conservation of Wild Birds Regulations sets out the way in which an infringement of the Regulations must be dealt with and provides for a series of penalties which, for offences committed in the context of the derogations, range from a minimum fine of EUR 500 together with the immediate suspension of the special licence to a fine of EUR 15 000 together with imprisonment for a term of two years, disqualification from holding a licence issued under the Regulations for life, as well as confiscation of the *corpus delicti*.

Framework Regulations

13 Legal Notice 253 of 15 July 2014 includes a framework for allowing a derogation opening an Autumn live-capturing season for finches ('the Framework Regulations').

14 Regulation 3 of the Framework Regulations provides:

'Finches may only be captured by traditional nets known as clap-nets exclusively for the purpose of keeping them in captivity, including for use in fairs and exhibitions, for breeding, and, or use as live-decoys in accordance with the provisions of these regulations: ... '

15 Regulation 3 sets out certain criteria concerning clap-nets, ringing of captured birds and minimum mesh size.

16 Regulation 4 of the Framework Regulations 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 Directive 2009/147 ..., 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.'

17 Regulation 8 of the Framework Regulations concerns enforcement during the finch capturing season. It provides for on-the-spot checks by the police and the allocation of at least seven officers on duty for every 1 000 licences.

18 The Framework Regulations include Schedule I which lists the seven species of finches in question.

19 Schedule II of the Framework Regulations is worded as follows:

'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:

[NATIONAL BAG LIMIT BY SPECIES

Linnet 12 000

Goldfinch 800

Greenfinch 4 500

Siskin 2 350

| | |
|-----------|--------|
| Hawfinch | 500 |
| Chaffinch | 5 000 |
| Serin | 2 350] |

The above 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.'

The 2014 Declaration

20 Legal Notice 250 of 15 July 2014 concerning the Conservation of Wild Birds (Declaration on a Derogation for a 2014 Autumn live-capturing season for Finches) Regulations, 2014 ('the 2014 Declaration') provides, in Regulation 3:

'... the period for the live-capturing of Finches for the year 2014, hereinafter referred to as the "Autumn live-capturing season", shall be on the following dates:

- live-capturing of Linnet, Goldfinch, Greenfinch, Siskin, Hawfinch, Chaffinch and Serin between the 20th October 2014 and the 31st December 2014, both dates included.'

21 Under Regulation 5(1) of the 2014 Declaration, the overall seasonal bag limits for the Autumn live-capturing season corresponds to those indicated in Schedule II to the Framework Regulations.

22 According to Regulation 5(2) of the 2014 Declaration, the live-capturing season's bag limit is set to ten finches for each Autumn live-capturing licence or however many below this number might have been captured before the season is closed.

The 2015 Declaration

23 Regulation 3 of Legal Notice 330 of 16 October 2015 concerning the Conservation of Wild Birds (Declaration on a Derogation for a 2015 Autumn live-capturing season for Finches) Regulations, 2015 ('the 2015 Declaration') is, for the year 2015, identical to Regulation 3 of the 2014 Declaration.

24 Regulation 5(1) and (2) of the 2015 Declaration is, *mutatis mutandis*, identical to Regulation 5(1) and (2) of the 2014 Declaration.

Background to the dispute and pre-litigation procedure

25 The Republic of Malta having adopted, in the course of 2014, the Framework Regulations and the 2014 Declaration, authorising the capture of seven finch species, the Commission sent, on 17 October 2014, a letter of formal notice to the Republic of Malta stating that the derogation regime of that Member State did not meet the conditions laid down in Article 9 of Directive 2009/147. According to the Commission, that Member State had failed to demonstrate that there is no other satisfactory solution and had not complied with the conditions relating to judicious use, small numbers and strict supervision laid down in Article 9(1) (c) of that directive.

26 The Republic of Malta, by letter of 14 November 2014, answered the letter of formal notice by maintaining that its derogation regime fulfilled the conditions set out in Article 9 of the Directive.

27 Dissatisfied with the Republic of Malta's answer, the Commission sent it a reasoned opinion on 28 May 2015.

- 28 The Republic of Malta answered that reasoned opinion by a letter dated 28 July 2015, reiterating the position that it had already set out in its letter of 14 November 2014.
- 29 After examining the Republic of Malta's answer and additional information, the Commission, considering that that Member State had not remedied the alleged failures to fulfil obligations, decided to bring the present action.

The action

- 30 The Commission claims that the derogation regime adopted by the Republic of Malta allowing the trapping of seven finch species is contrary to Article 5(a) and (e) and Article 8(1) of Directive 2009/147, read in conjunction with point (a) of Annex IV to that directive, and does not meet the conditions justifying the application of the derogation laid down in Article 9(1) of that directive.
- 31 As regards those conditions, the Commission claims, in the first place, that the Republic of Malta fails to establish the absence of another satisfactory solution, as required by that provision. In the second place, that Member State fails to state reasons to demonstrate the absence of another satisfactory solution to justify its derogation regime. In the third place, the Republic of Malta has not demonstrated that the permitted activity constitutes 'judicious use' within the meaning of Article 9(1)(c) of Directive 2009/147. In the fourth place, the Republic of Malta fails to show that it complies with the condition laid down in Article 9(1)(c) of that directive, according to which the derogation at issue can concern only small numbers of birds. Finally, the defendant Member State has not established that the authorisation is given under 'strictly supervised conditions' as required by Article 9(1)(c) of that directive.

The alleged failure to state reasons, in the Maltese derogation system, for the absence of another satisfactory solution, within the meaning of Article 9 of Directive 2009/147, as well as the alleged failure to demonstrate the absence of another satisfactory solution, within the meaning of Article 9(1) of that directive

Arguments of the parties

- 32 First, the Commission submits that the Maltese derogation regime is too general and does not contain any clear and sufficient statement of reasons for the absence of another satisfactory solution.
- 33 Regulation 4 of the Framework Regulations provides only that when opening an Autumn finch live-capturing season, the Minister must determine that there is no other satisfactory solution in terms of Article 9(1) of Directive 2009/147. The Framework Regulations do not contain any reference to captive breeding and do not specifically require the Minister to assess whether captive breeding constitutes another satisfactory solution before authorising finch trapping for a particular season.
- 34 Furthermore, the 2014 and 2015 Declarations, authorising Autumn finch trapping during the 2014 and 2015 seasons, do not comply with the vague requirement in Regulation 4 of the Framework Regulations since they do not contain any determination of whether there is no other satisfactory solution, or even the reasons why the Minister did not consider captive breeding as a satisfactory alternative when he authorised those two trapping seasons.
- 35 Finally, the deliberations and recommendations of the Ornis Committee do not meet the requirement for a clear and sufficient statement of reasons. The minutes of the meetings of the Ornis Committee cited by the Republic of Malta do not reveal any in-depth assessment of alternative solutions and, moreover, the 2014 and 2015 Declarations themselves do not contain any assessment or findings concerning the absence of other satisfactory solutions.
- 36 Second, the Commission points out that, according to Regulation 3 of the Framework Regulations, the particular problem or specific situation which the Maltese authorities seek to address is the authorisation of

finch trapping exclusively for the purpose of keeping them in captivity, including for use in fairs and exhibitions, for breeding and/or use as live-decoys.

37 However, the trapping of wild finches, which is contrary to Articles 5 and 8 of Directive 2009/147, is not necessary for keeping finches in captivity, since captive breeding constitutes a satisfactory solution to that effect.

38 Furthermore, the Republic of Malta has not demonstrated that captive breeding is not a satisfactory alternative solution to trapping. Many studies and reports mentioned by that Member State confirm that captive breeding is technically and scientifically possible for the seven species concerned. Consequently, the fact that that option requires Maltese bird fanciers to change their behaviour — that is, instead of keeping in captivity the wild birds they caught, they will have to keep birds bred in captivity — does not prevent it from being regarded as a satisfactory solution.

39 In answer to the Republic of Malta's claim that its derogation regime is not merely aimed at acquiring finches to keep them in captivity, but is also designed to enable persons who practice the live-capturing of finches to lawfully pursue their activity of capturing and keeping those birds, in accordance with national tradition, the Commission states that, if that claim were to be accepted, it would render the 'no other satisfactory solution test' of Article 9(1) of Directive 2009/147 meaningless. Thus, by overstressing the scope of the derogation provision, the conservation system set up by the Directive would be compromised. The consequence would be that there cannot be any other satisfactory solution because none would equal the trapping of wild birds.

40 The Republic of Malta submits, first, that the decisions to authorise a derogation concerning the live-capturing of finches for the years 2014 and 2015 were adopted only after the Ornithological Committee had devoted multiple sittings to discussing those reasons, conditions and requirements on the basis of detailed technical, legal and scientific reports presented to it. On the basis of those factors, in both instances, the Ornithological Committee recommended the application of a derogation, after ascertaining that all conditions of Article 9(1)(c) of the Directive were met.

41 Contrary to the Commission claims, it was not necessary for the 2014 and 2015 Declarations to include a determination on the absence of another satisfactory solution since the detailed assessments carried out by the Ornithological Committee, in accordance with the requirements of Regulations 9 and 10 of the Conservation of Wild Birds Regulations, finding that there was no other satisfactory solution, were carried out before the Minister's decision to publish those declarations.

42 As regards the Commission's criticism concerning the inadequacy of the Ornithological Committee's recommendations, the Republic of Malta submits that the minutes of the Ornithological Committee meetings merely set out a summary of the discussion that took place on all aspects of the derogation at issue, including the reasons for that derogation and an assessment of potential solutions. The in-depth assessment in the strict sense, with the reasons, is set out exhaustively in the technical memorandum on the derogation envisaged for the live-capturing of seven species of finches of April 2014, originating from the Wild Bird Regulation Unit ('the WBRU's technical memorandum'), which is part of the Ministry for the Environment, Sustainable Development and Climate Change. The entire derogation regime adopted by the Republic of Malta is a comprehensive and robust mechanism that complies with the requirements laid down in Article 9(1)(c) of Directive 2009/147.

43 Second, the Republic of Malta contends that the Commission's understanding of the purpose of the Framework Regulations is incorrect. The fact that the seven species of finches are captured with a view to keeping them captive for recreational purposes does not prevent the capturing activity from also constituting a purpose in itself. The capturing and subsequent keeping in captivity are both an integral part of the tradition which the Maltese authorities seek to protect within the strict parameters of Article 9(1)(c) of Directive 2009/147. A captive breeding programme merely provides a partial solution for one of these activities, namely the keeping in captivity of specimens by bird fanciers for whom the capturing of those specimens is not necessarily of interest.

- 44 Before adopting its decision to apply the derogation at issue concerning the live capturing of finches, the Republic of Malta carefully assessed all potential alternative solutions which were implemented between 2004 and 2014. As a result of that assessment, the Maltese authorities concluded that, taking into account the unique socio-cultural context and the biogeographical circumstances of the Maltese Islands, as well as the practical experience gained in the implementation of all other potential alternative activities — including, inter alia, the ringing and release programme or the possibility of the live-capturing of species other than finches — none of the alternatives assessed, except for a limited, strictly controlled and supervised derogation for finches, provided a satisfactory alternative solution to the long-standing traditional and recreational practice of live-capturing and keeping in captivity the seven finch species.
- 45 The Republic of Malta submits that, if, as the Commission claims, the trapping as an ‘end in itself’ of protected birds not listed in Annex II to Directive 2009/147, such as the finches in question, could not constitute judicious use, within the meaning of Article 9(1)(c) of that directive, no derogation aimed at safeguarding traditional recreational activities could be allowed in the Member States under this provision. Such a restrictive interpretation is incorrect both in legal and factual terms. It finds, moreover, no support in the settled case-law of the Court regarding Article 9(1)(c) of Directive 2009/147.
- 46 According to the Republic of Malta, whilst it is admittedly not the principal aim of the Directive to protect traditional activities, the Directive also does not rule out the possibility that certain traditional hunting or trapping activities may be maintained in a way that fulfils the strict conditions laid down in Article 9(1)(c). Furthermore, the Commission itself concedes that a derogation based on tradition and authorising the capturing and keeping in captivity of certain bird species was not necessarily in conflict with the provisions of Directive 2009/147.

Findings of the Court

- 47 It should be borne in mind that, according to the case-law of the Court, in order to permit the competent authorities to resort to the derogations laid down in Article 9 of Directive 2009/147 only in a manner which complies with EU law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is consonant with the principle of legal certainty. Accordingly, the applicable national legislation must specify the criteria for the derogation clearly and precisely and require the authorities responsible for their application to take them into account. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions exist for each derogation, the Member States are required to ensure that all action affecting the 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 that directive (see, to that effect, judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraphs 33 and 34).
- 48 As regards Malta’s legislation, it must be noted that, contrary to what the Commission, in essence, claims, the applicable national legislation concerning the conservation of wild birds sets out the criteria for derogation clearly and precisely and requires the authorities responsible for their application to take them into account. As indicated in paragraphs 10 and 16 of the present judgment, Regulation 9 of the Conservation of Wild Birds Regulations transposes, in essence, Article 9 of Directive 2009/147, whereas Regulation 4 of the Framework Regulations requires the Minister to verify, when opening an Autumn finch live-capturing season, that there is no other satisfactory solution, within the meaning of Article 9(1) of Directive 2009/147. That finding cannot be called into question by the fact, raised by the Commission, that the Framework Regulations do not contain any reference to captive breeding and do not specifically require the Minister to assess whether captive breeding constitutes another satisfactory solution before authorising the trapping of finches for a specific season.
- 49 By contrast, it must be held that the 2014 and 2015 Declarations authorising the Autumn trapping of finches during the 2014 and 2015 seasons do not comply with Article 9 of Directive 2009/147.

50 Those declarations do not contain any reference to the absence of another satisfactory solution. Furthermore, in any event, those declarations do not refer to the technical, legal and scientific reports which, according to the Republic of Malta, had been submitted to the Ornis Committee, nor to the recommendations based on that information, which, according to that Member State, had been made by the Ornis Committee to the Minister and called for the implementation of the derogation at issue given that all the conditions laid down in Article 9(1)(c) of Directive 2009/147, including the absence of another satisfactory solution, had been found to be met.

51 It follows that those declarations do not constitute decisions containing a clear and sufficient statement of reasons concerning the condition of the absence of another satisfactory solution laid down in Article 9 of Directive 2009/147.

52 Consequently, the complaint alleging failure to state reasons, in the Maltese derogation system, concerning the absence of another satisfactory solution is well founded and must therefore be upheld.

53 In the light of the aforementioned finding, it does not appear, in the present case, necessary to examine the complaint alleging failure to demonstrate the absence of another satisfactory solution within the meaning of Article 9(1) of Directive 2009/147.

The alleged failure to comply with the condition laid down in Article 9(1)(c) of Directive 2009/147, according to which the derogation provided for in that provision must concern only small numbers

Arguments of the parties

54 The Commission submits that the WBRU's calculation of 'small numbers' in its technical memorandum, on which the bag limits laid down by the Maltese derogation regime are based, is not substantiated by sound scientific evidence.

55 First, the WBRU did not identify the relevant source populations on the basis of a robust monitoring system. The Republic of Malta relied on only one study, that is Raine's 2007 study, which is based on a very limited sample of birds. As regards the Hawfinch, there were no ring recoveries in Malta for that species and the WBRU took as a basis ring recoveries in Italy. However, the WBRU did not explain why it regarded that population as an appropriate proxy.

56 Second, the Republic of Malta tends to count very important breeding populations as part of its 'reference population', relying on a small number of ring recoveries in Malta, even if the majority of such breeding populations do not migrate through Malta. Thus, the Republic of Malta takes into account the huge breeding population of the Chaffinch in Poland as part of the 'reference populations'. However, leading ornithologists have pointed out that Chaffinches breeding in Poland migrate through the eastern Low Countries, Germany, and Switzerland in order to winter chiefly in south-west France and western Iberia. Even if some birds appear to migrate through Malta, it seems scientifically incorrect to include the entire Polish breeding population, composed of 5 to 10 million birds, as part of the 'reference population' for the calculation of small numbers.

57 Third, Malta's selection of source populations is not consistent with its stated methodology. That Member State wrongly claims that it only took into account source populations from countries with stable or increasing populations. Recent data of the European Bird Census Council show decreasing populations of the species concerned, as the case may be, in Germany, Italy, Austria, Poland, Slovenia and the United Kingdom.

58 Finally, as regards the mortality rate, the WBRU's technical memorandum does not explain sufficiently how the mortality rate estimates are obtained. The figures presented by the WBRU do not correspond to the figures indicated in the reference studies or are not supported by any scientific sources.

59 The Republic of Malta contends that the Raine study, carried out under the aegis of, and on behalf of, BirdLife Malta, in the course of 2007, is still, to this day, the most recent study available. The Commission's view that the Raine study does not meet the thoroughness and reliability required for the monitoring of birds is surprising since it relies itself on that same study to support various factual arguments.

60 The Commission's criticism of the analysis by the Republic of Malta of the conservation status of the seven finch species is based on earlier statements set out in the reasoned opinion, which contains a number of incorrect factual assertions. In April 2015, the Maltese authorities carried out an updated assessment of the conservation status of the species concerned, which took into account all recent scientific updates, which contradicts the Commission's allegations.

61 As regards the mortality rate of the seven species at issue, the Republic of Malta submits that they were correctly interpreted by the WBRU in its technical memorandum since the WBRU relied on key scientific sources. Where, for the same species, the scientific sources specified different mortality rates, the Maltese authorities used the minimum value, in accordance with the Commission's Guide to Sustainable Hunting.

Findings of the Court

62 It is important to note that, in exercising their powers concerning the grant of derogations, in accordance with Article 9 of Directive 2009/147, the authorities of the Member States must take account of various criteria which relate to geographic, climatic, environmental and biological factors and, in particular, to the situation regarding the species' reproduction and total annual mortality rate owing to natural causes (see, to that effect, judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 25).

63 Regarding those criteria, it must be considered that, on the basis of current scientific knowledge, 'small numbers', within the meaning of Article 9(1)(c) of Directive 2009/147, should be understood as any sample of less than 1% of the total annual mortality of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted, and 'population in question' is to be understood, with regard to migratory species, as the population of those regions from which come the main contingents passing through the region to which the derogation applies during its period of application (see, to that effect, judgment of 11 November 2010, *Commission v Italy*, C-164/09, not published, EU:C:2010:672, paragraph 35).

64 The Court pointed out in that regard that those quantities are based on the work of the ORNIS Committee for the Adaptation to Technical and Scientific Progress under Directive 2009/147, instituted under Article 16 of the latter and consisting of representatives of the Member States (see, to that effect, judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 26).

65 According to the Court's case-law, although the percentages referred to above are not legally binding, they can nonetheless constitute, by reason of the scientific value of the work of the ORNIS Committee and the absence of any element of scientific proof to the contrary, a basis for assessing whether a derogation granted under Article 9(1)(c) of Directive 2009/147 complies with that provision (see, to that effect, judgment of 8 June 2006, *WWF Italia and Others*, C-60/05, EU:C:2006:378, paragraph 27).

66 The 'small numbers' requirement cannot be met if the trapping of birds authorised by way of derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level (see, to that effect, judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 17).

67 In that connection, it must be noted that, as regards the Goldfinch and the Chaffinch, the 'population in question', also known as 'reference population', cannot be determined in the light of the sole available relevant study in the context of the present case, that is the 2007 Raine study, according to which the sample of rings recovered for both those species is too limited to provide conclusive information on the regions of origin of the main bird contingents frequenting the region to which the derogation at issue

applies. In these circumstances and in the absence of any other relevant evidence, it must be stated that the Republic of Malta has not shown that the bag limits, fixed at 800 specimens for the Goldfinch and 5 000 for the Chaffinch, correspond to ‘small numbers’ within the meaning of Article 9(1)(c) of Directive 2009/147.

- 68 The same applies to the Hawfinch, for which, first, there has been no ring recovery reported in Malta and, second, the Maltese authorities relied on ring recoveries in Italy, without substantiating with any scientific evidence the view that such a sample could constitute a suitable ‘proxy’.
- 69 As regards the four other finch species covered by the derogation at issue, it must be noted that, although the bag limits permitted for those species by the Maltese derogation measures are quite clearly below the ceiling of 1% of the total annual mortality rate of the populations in question, as identified by the 2007 Raine study, the limited size of the sample of ringed and released birds, namely 112 specimens, on which that study is based, is such as to cast doubt on the accuracy of the identification of those populations, particularly if that study is compared to the large number of birds declared captured in Malta during the 2014 Autumn season, which amounts to 7 222 finches. Therefore, for the Linnet, the Greenfinch, the Siskin and the Serin, there cannot be any scientific certainty regarding the regions selected in that study, as regions of origin of the populations which supply the main contingents frequenting the region to which the derogation at issue applies.
- 70 In addition, it is apparent from the file that a study of the migratory flux of the seven finch species in question over the Maltese Islands during the period of the derogation at issue was only carried out after the adoption of the derogation regime by the Republic of Malta.
- 71 Furthermore, the 2007 Raine study itself shows that, in Malta, trapping is so intensive that only a handful of each of the common finch species regularly breed on the islands, whereas they breed in high numbers in other areas of the Mediterranean. According to that study, breeding populations in Malta, in particular of the Serin, the Greenfinch and the Linnet, only include, at most, one to five pairs.
- 72 Finally, although the Republic of Malta claims to have taken into account only reference populations from countries with stable or increasing populations, it must be noted that that Member State’s selection of those populations has not always been consistent with the stated methodology.
- 73 In that connection, as regards the Linnet, it must be noted that, as is apparent from the WBRU’s technical memorandum, relating to the conservation of the seven finch species in question, of May 2015, which was added by the Republic of Malta to the documents before the Court in the present case, the Maltese authorities also took into account, for the purpose of the 2015 Autumn capturing season, reference populations in decline or whose conservation status was not known. That is also true for the Greenfinch, the Serin and the Siskin.
- 74 It follows from all the foregoing considerations that the Republic of Malta has not adduced sufficient evidence that its derogation regime for the trapping of the seven finch species in question makes it possible to ensure the maintenance of the populations of those species at a satisfactory level.
- 75 Therefore, taking into account the case-law referred to in paragraph 66 of the present judgment, it must be held that the condition of ‘small numbers’ is not met in the present case.
- 76 Consequently, the complaint alleging failure to comply with the condition laid down in Article 9(1)(c) of Directive 2009/147, according to which the permitted derogation must concern only ‘small numbers’, must be upheld.

Alleged lack of evidence that the permitted derogation amounts to ‘judicious use’ within the meaning of Article 9(1)(c) of Directive 2009/147

Arguments of the parties

- 77 The Commission submits, first, that the trapping of specimens of species not listed in Annex II to Directive 2009/147 as an end in itself cannot amount to judicious use, within the meaning of Article 9(1)(c) of that directive.
- 78 Next, since the Republic of Malta has not demonstrated its capacity to ensure that the population of the seven finch species in question is maintained at a satisfactory level, the trapping of birds cannot, in any event, be considered judicious.
- 79 Finally, the Commission also claims that the Maltese derogation regime is disproportionate, having regard, in particular, to the authorisation of the method of capture using clap-nets. Since such nets are, pursuant to Article 8(1) of Directive 2009/147, read in conjunction with point (a) of Annex IV thereto, regarded as a non-selective method, a derogation involving their use cannot be considered to be proportionate.
- 80 The Republic of Malta contends that both the capturing and keeping in captivity amount to judicious use, within the meaning of Article 9 of Directive 2009/147.
- 81 It argues, furthermore, that the method of capture using clap-nets authorised by the live-capturing of finches derogation regime that it adopted allows capture on a selective basis because the nets are manually operated by trained and licensed live-capturers.

Findings of the Court

- 82 It is apparent from the Court's case-law that, where the condition that the trapping of protected species must concern only certain birds in small numbers is not met, the exploitation of birds by trapping for recreational purposes cannot, in any event, be considered judicious within the meaning of Article 9(1)(c) of Directive 2009/147 (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 17, and of 8 June 2006, *WWF Italy and Others*, C-60/05, EU:C:2006:378, paragraph 32).
- 83 As held in paragraph 75 of the present judgment, the condition of 'small numbers' is not met in this instance. In the light of the case-law referred to in paragraph 82 of the present judgment, it follows that the exploitation of the birds in question through trapping for recreational purposes cannot, in any event, be considered judicious.
- 84 Furthermore, as regards the Commission's complaint alleging the non-selective nature of the method of capture using the nets at issue in the present case, the Maltese authorities acknowledged, in the WBRU's technical memorandum, the non-selective nature of such nets since they have admitted the existence of 'by-catch' despite the fact that those nets are manually triggered by hunters. The non-selective nature of that method of capture is, moreover, confirmed by Birdlife Malta's study of July 2015.
- 85 Consequently, the condition laid down in Article 9(1)(c) of Directive 2009/147, according to which the live-capturing of finches can only be permitted if it is carried out on a selective basis, is not met in this instance. Accordingly, the conditions for derogating from Article 8(1) of that directive are not, in the present case, fulfilled.
- 86 Therefore, the complaint alleging lack of evidence that the authorised derogation amounts to a judicious use, within the meaning of Article 9(1)(c) of Directive 2009/147, and the complaint alleging that the method of capture at issue is non-selective, in infringement of that provision and of Article 8(1) of that directive, must be upheld.

Alleged lack of evidence that the derogation is permitted under strictly supervised conditions within the meaning of Article 9(1)(c) of Directive 2009/147

Arguments of the parties

- 87 The Commission claims that the Republic of Malta has not demonstrated that the conditions of its derogation regime are strictly enforced. The report on the 2014 trapping season submitted by the Republic of Malta confirms that the two pillars of the enforcement regime — self-reporting by SMS and occasional on-the-spot checks by police officers — contain systemic flaws and do not allow for the effective monitoring of the derogation conditions.
- 88 First, the SMS tracking system is based on self-reporting by the licence holders and there is, therefore, a high risk that it may be abused. The highly questionable number of captured birds that was reported by means of the SMS system in the course of 2014 well illustrates that risk. Second, the Republic of Malta has not demonstrated that the second pillar of its enforcement regime, on-the-spot checks, ensures sufficiently strict supervision.
- 89 Furthermore, several non-governmental organisations' reports on the 2014 trapping season have illustrated the inadequacy of that supervision. Those reports show widespread non-compliance with the derogation conditions, ranging from the use of illegal bird callers or the misuse of 'single-use' rings to the trapping of species not covered by the derogation and the non-respect of restrictions relating to authorised times and places, in particular the widespread trapping inside 'Natura 2000' sites.
- 90 The Republic of Malta contends that it has enacted an enforcement and supervision regime of a rigour unprecedented within the EU. The use of the system making real time bag reporting mandatory by telephone made it possible to collect and check in real time any individual licence holder's catches as well as the uptake of individual bag limits, and to monitor the uptake of national quotas. An obligation was imposed on all licence holders to fit specially marked, single-use rings on every bird captured, immediately upon making a catch. The use of the rings is rigorously enforced during spot checks in the field. At the end of the season, unused rings must be returned to the authorities.
- 91 The Republic of Malta states, finally, that, during the period of the derogation, the Maltese authorities routinely deployed a daily complement of over 50 officers in order to oversee compliance with the legal parameters. All the registered live capturing stations were inspected at some point during the derogation and 23% of all the individual licence holders were subject to a thorough spot check inspection.

Findings of the Court

- 92 As regards, inter alia, the trapping of birds such as that at issue in these proceedings, that activity can be permitted, pursuant to Article 9(1)(c) of Directive 2009/147, only if it is, in particular, carried out under strictly supervised conditions (see, to that effect, judgment of 16 October 2003, *Ligue pour la protection des oiseaux and Others*, C-182/02, EU:C:2003:558, paragraph 15).
- 93 In that regard, it must be noted that it is not disputed that 30 licence holders declared that they had reached the individual seasonal bag limit of ten finches on the last day of the season, a day on which the study of the migratory influx of the seven finch species in question, referred to in paragraph 70 of the present judgment, recorded the lowest migration levels of the season. In these circumstances, the accuracy of such statements seems uncertain.
- 94 In the context of Malta, characterised by a very high density of licence holders, namely over 4 000, and of registered trapping stations, namely over 6 400, the fact that merely 23% of hunters have been subject to individual checks seems inadequate.
- 95 Furthermore, it is apparent from Birdlife Malta's study of July 2015 that failure to observe the restrictions relating to authorised catch periods and locations, in particularly by trapping inside 'Natura 2000' sites, has been rather frequent during the 2014 Autumn capturing season.
- 96 According to that study, 41 591 single-use rings were issued for the 2014 Autumn capturing season, bearing in mind that the catch limit for all seven finch species had been fixed at 26 850 specimens. The system provided for and required licence holders to return unused rings. At the end of the season, 38 602

rings remained in the possession of licence holders, that is 11 752 more than the catch limit of 26 850 birds and 31 380 more than the 7 222 finches whose capture had been declared during that season.

97 It follows from the foregoing that the Republic of Malta has failed to adduce evidence that the derogation at issue is used under strictly controlled conditions, within the meaning of Article 9(1)(c) of Directive 2009/147. Therefore, the complaint based on that failure to adduce evidence must be upheld.

98 Consequently, it must be held that, by adopting the derogation regime allowing the live-capturing of seven species of wild finches (Chaffinch *Fringilla coelebs*, Linnet *Carduelis cannabina*, Goldfinch *Carduelis carduelis*, Greenfinch *Carduelis chloris*, Hawfinch *Coccothraustes coccothraustes*, Serin *Serinus serinus* and Siskin *Carduelis spinus*), the Republic of Malta has failed to fulfil its obligations under Article 5(a) and (e) and Article 8(1) of Directive 2009/147, read in conjunction with Article 9(1) of that directive.

Costs

99 Under Article 138(1) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Republic of Malta has, in essence, been unsuccessful, the latter must be ordered to pay the costs.

On those grounds, the Court (Third Chamber) hereby:

- 1. Declares that, by adopting a derogation regime allowing the live-capturing of seven species of wild finches (Chaffinch *Fringilla coelebs*, Linnet *Carduelis cannabina*, Goldfinch *Carduelis carduelis*, Greenfinch *Carduelis chloris*, Hawfinch *Coccothraustes coccothraustes*, Serin *Serinus serinus* and Siskin *Carduelis spinus*), the Republic of Malta has failed to fulfil its obligations under Article 5(a) and (e) and Article 8(1) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds, read in conjunction with Article 9(1) of that directive;**
- 2. Orders the Republic of Malta to pay the costs.**

Bay Larsen

Malenovský

Safjan

Šváby

Vilaras

Delivered in open court in Luxembourg on 21 June 2018.

A. Calot Escobar

L. Bay Larsen

* Language of the case: English.