Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

19 September 2024*

(Failure of a Member State to fulfil obligations – Directive 2009/147/EC – Conservation of wild birds – Article 5, Article 8(1) and Article 9(1) – Derogation scheme allowing the live-capturing of seven species of wild finches – Member States' power of derogation for research purposes – Conditions)

In Case C-23/23,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 20 January 2023,

European Commission, represented by C. Hermes and R. Lindenthal, acting as Agents,

applicant,

v

Republic of Malta, represented by A. Buhagiar, acting as Agent, assisted by D. Sarmiento Ramírez-Escudero, abogado,

defendant,

THE COURT (First Chamber),

composed of A. Arabadjiev, President of the Chamber, L. Bay Larsen (Rapporteur), Vice-President of the Court, T. von Danwitz, A. Kumin and I. Ziemele, Judges,

Advocate General: T. Ćapeta,

Registrar: L. Carrasco Marco, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2024,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2024,

gives the following

* Language of the case: English.

Judgment

1 By its application, the European Commission asks the Court to declare that, by adopting a derogation scheme allowing the live-capturing of seven species of wild finches, namely the chaffinch *(Fringilla coelebs)*, the linnet *(Carduelis cannabina)*, the goldfinch *(Carduelis carduelis)*, the greenfinch *(Carduelis chloris)*, the hawfinch *(Coccothraustes coccothraustes)*, the serin *(Serinus serinus)* and the siskin *(Carduelis spinus)* ('the relevant seven species of wild finches'), the Republic of Malta has failed to fulfil its obligations under Article 5 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 (OJ 2010 L 20, p. 7), read in conjunction with Article 9(1) of that directive.

Legal context

European Union law

Directive 2009/147

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 8(1) of that directive provides that '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).'

5 The fourth indent of point (a) of Annex IV to Directive 2009/147 lists the following means:

'– nets, traps, poisoned or anaesthetic bait'.

6 Article 9(1) and (2) of that 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:

…

(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.

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

Regulations on the conservation of wild birds

7 Legal Notice 79 – Conservation of Wild Birds Regulations, of 29 March 2006 (‘the Conservation of Wild Birds Regulations’), constitutes the main legal act transposing Directive 2009/147 into Maltese law.

8 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 decision-making procedure which includes a mandatory assessment by the Maltese Ornis Committee (‘the Ornis Committee’).

9 In accordance with Regulation 10 of the Conservation of Wild Birds Regulations, the role of the Ornis Committee consists, inter alia, in making recommendations to the Minister responsible for the environment (‘the Minister’) on the authorisation of derogations from the provisions of Regulations 4 to 7, 18 and 21 and in ensuring at regular intervals that the conditions governing the granting of such authorisation or authorisations continue to be fulfilled. In addition, Regulation 10 lays down the power of the Minister, when considering the recommendations of the Ornis Committee, to decide on the authorisation of derogations, and his or her obligation to state in writing the reasons for his or her decision in the event of a significant divergence between the recommendations of the Ornis Committee and his or her decision.

10 Regulation 27 of the Conservation of Wild Birds Regulations sets out the procedures to be followed in cases of infringement of those regulations and the penalties applicable in cases of infringements committed in the context of derogations.

The research derogation scheme adopted in 2020

– *The 2020 Framework Regulations*

11 Legal Notice 399 – Conservation of Wild Birds (Framework for Allowing a Research Derogation to determine Malta's Reference Population of Seven Finch Species) Regulations, 2020, of 19 October 2020 ('the 2020 Framework Regulations') establishes a research derogation for the live-capturing of the relevant seven species of wild finches.

12 Regulation 1(2) of the 2020 Framework Regulations, states:

'The purpose of these regulations is to establish a framework allowing a research derogation to determine Malta's reference population of the [relevant] seven [species of wild finches] on the basis of Article 9(1)(b) of Directive [2009/147]. These regulations specifically aim to gather sufficient scientific information in order for Malta to introduce a derogatory regime in terms of Article 9(1)(c) of [Directive 2009/147] that complies with the "small numbers"-criterion as interpreted by the Court of Justice in its judgment [of 21 June 2018, *Commission* v *Malta* (C-557/15, EU:C:2018:477)].'

13 Regulation 3 of those framework regulations sets out that birds belonging to those seven species can only be captured with nets known as 'clap-nets' with a mesh size of not less than 18 mm x 18 mm, for the purpose of being controlled and/or ringed and/or or fitted with a satellite-tag. Ring recovery forms must be returned to the Maltese Wild Birds Regulation Unit ('the WBRU'), which forms part of the Ministry for the Environment, Sustainable Development and Climate Change.

14 Regulation 4 of those framework regulations provides that the Minister may declare a research period of not more than 64 days in autumn and determine that there is 'no other satisfactory solution' within the meaning of Article 9(1) of Directive 2009/147.

15 Regulation 5 of the 2020 Framework Regulations establishes that the live-capturing of the relevant seven species of wild finches may only be exercised by persons holding a licence for this purpose. That licence may only be granted to persons who, inter alia, submit site plans locating their approved clap-nets, have attended a mandatory course on the research objectives and have passed an examination in that regard.

– *The 2020 Declaration*

16 In accordance with Regulation 1(2) of Legal Notice 400 – Conservation of Wild Birds (Declaration on a Derogation allowing a Research Period to determine Malta's Reference Population of Seven Finch Species) Regulations, 2020, of 19 October 2020 ('the 2020 Declaration'):

'… given that within the territory of the Republic of Malta:

(a) [the relevant seven species of wild finches] are non-resident, passage migrants; and

(b) very limited data on ring recoveries pertaining to [the relevant seven species of wild finches] have been collected to date … to provide conclusive information on the regions of origin of the main bird contingents (reference population) …

the Minister is hereby ascertaining the absence of another satisfactory solution to carry out a comprehensive research study by licensed individuals using registered clap-nets as the most selective method … for capturing specimens from the relevant species, in order to record data on ring recoveries (control) and affix scientific rings, followed by their immediate release back into the wild and in so far as it is absolutely necessary to obtain data to determine Malta's reference population of the relevant species, in accordance with the provisions of [Directive 2009/147] and the [2020 Framework Regulations].'

17 Regulation 4 of that declaration provides:

'… the research period for [the relevant seven species of wild finches] for the year 2020 shall be sixty-two (62) days from [20] October 2020 to [20] December 2020, both dates included …

…'

The research derogation scheme adopted in 2021

– *The 2021 Framework Regulations*

18 Legal Notice 387 – Conservation of Wild Birds (Framework for Allowing a Research Derogation to Determine Malta's Reference Population of Seven Finch Species) (Repeal) Regulations, 2021, of 14 October 2021, repealed the 2020 Framework Regulations.

19 Legal Notice 394 – Conservation of Wild Birds (Framework for Allowing a Derogation to Carry out Scientific Research on Seven Finch Species) Regulations, of 19 October 2021 ('the 2021 Framework Regulations'), established a research derogation scheme allowing the live-capturing of the relevant seven species of wild finches.

20 Article 8 of the 2021 Framework Regulations is worded in the same terms as Article 4 of the 2020 Framework Regulations.

– *The 2021 Declaration*

21 In accordance with Regulation 1(2) of Legal Notice 395 – Conservation of Wild Birds (Declaration on a Derogation Allowing Scientific Research on Seven Finch Species) Regulations, 2021, of 19 October 2021:

'… given that within the territory of the Republic of Malta:

(a) [the relevant seven species of wild finches] are non-resident, passage migrants;

(b) the mist-net system used for capturing birds is not adequate to provide data … on ring recoveries pertaining to the relevant species to provide conclusive information on the regions of origin of the main bird contingents (reference population), as confirmed by the Court of Justice … in [the judgment of 21 June 2018, *Commission* v *Malta* (C-557/15, EU:C:2018:477)]; and since

(c) bird-ringers from the national ringing scheme cannot and are ethically against the use [of] live-decoys for the purpose of ringing and control, which live-decoys are the key component of how a clap-net system operates …,

the Minister is hereby ascertaining the absence of another satisfactory solution to carry out a comprehensive research study by licensed individuals using registered clap-nets as the most selective method … for capturing specimens from the relevant species, in order to record data on ring recoveries (control) and affix scientific rings, followed by their immediate release back into the wild and in so far as it is absolutely necessary to obtain data to determine Malta's reference population of the relevant species, in accordance with the provisions of [Directive 2009/147] and the Framework Regulations.'

22 Regulation 4 of that declaration provides:

'… the research period for the relevant species for the year 2021 shall be sixty-two (62) days from [20] October 2021 to [20] December 2021, both dates included …

…'

The research derogation scheme adopted in 2022

– *The 2022 Framework Regulations*

23 Legal Notice 256 – Conservation of Wild Birds (Framework for Allowing a Derogation to Carry out Scientific Research on Seven Finch Species) (Amendment) Regulations, 2022, of 19 October 2022, amended certain provisions of the 2021 Framework Regulations.

– *The 2022 Declaration*

24 Legal Notice 257 – Conservation of Wild Birds (Declaration on a Derogation Allowing Scientific Research on Seven Finch Species in Autumn 2022) Regulations, 2022, of 19 October 2022 ('the 2022 Declaration') opened another 'research period', running from 20 October until 20 December 2022, under the same conditions as those established in the 2021 Declaration.

Background to the dispute and pre-litigation procedure

25 In 2014, the Republic of Malta had adopted, on the basis of Article 9(1)(c) of Directive 2009/147, a derogation scheme allowing the live-capturing of the relevant seven species of wild finches. In its judgment of 21 June 2018, *Commission* v *Malta* (C-557/15, EU:C:2018:477), the Court held that by adopting that derogation scheme, the Republic of Malta had 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)(c) of that directive.

26 As a result of that judgment, the Republic of Malta adopted, on 19 October 2020, on the basis of Article 9(1)(b) of Directive 2009/147, the research derogation scheme mentioned in paragraphs 11 to 17 of the present judgment, allowing the trapping of the relevant seven species of wild finches. On 3 December 2020, the Commission sent that Member State a letter of formal notice, informing it that the scheme was incompatible with Article 5 and Article 8(1) of that directive and was not justified for research purposes in accordance with Article 9(1)(b) of the same directive. With regard to the latter provision, the Commission was of the view that the Republic of Malta had failed to demonstrate that this derogation scheme was adopted as a result of the absence of another satisfactory solution and had not established that the said scheme pursued a genuine research purpose.

27 By letter of 3 February 2021, the Republic of Malta replied that the research derogation scheme adopted in 2020 fulfilled the conditions set out in Article 9 of Directive 2009/147.

28 Since it considered the arguments invoked by the Republic of Malta in response to the formal notice as not satisfactory, the Commission, on 9 June 2021, sent that Member State a reasoned opinion inviting it to adopt the measures necessary to comply with that opinion within one month of notification thereof.

29 On 14 October 2021, the Minister repealed the 2020 Framework Regulations 'without prejudice to the validity of anything done or omitted to be done thereunder'.

30 On 19 October 2021, the Minister adopted the research derogation scheme mentioned in paragraphs 18 to 22 of the present judgment for the period running from 20 October until 20 December 2021. By means of the 2022 Declaration, that Minister opened another 'research period', running from 20 October until 20 December 2022.

The action

31 The Commission states that, since the 2020 and 2021 Framework Regulations and the 2020, 2021 and 2022 Declarations form part of the same conduct, they must be treated as one and the same research derogation scheme in the light of Article 9(1)(b) of Directive 2009/147. The Commission observes that the Republic of Malta has not disputed that that research derogation scheme is incompatible with the prohibitions set out in Article 5(a) and Article 8(1) of Directive 2009/147, read in conjunction with Annex IV(a) thereto, and is of the view that that Member State has not established that the conditions for derogation laid down in Article 9(1)(b) of that directive were satisfied. First, the Republic of Malta has not established that the said scheme pursues a research objective. Second, that Member State fails to state the reasons for the absence of another satisfactory solution. Third, that Member State fails to demonstrate the absence of such an alternative.

Admissibility

Arguments of the parties

32 The Republic of Malta invokes the inadmissibility of the action, inasmuch as it is based on a reasoned opinion which was promptly followed by a substantial amendment of the national legal framework, which the application confuses with the previous legal framework. According to that

Member State, the lack of clarity of the subject matter and the scope of the action is detrimental to the exercise of the right to a fair hearing. In fact, the Commission does not specify in its application if its objections relate to the legal framework which was in force at the time of the expiry of the period laid down in the reasoned opinion, or to the legal framework which is currently in force.

33 The Republic of Malta notes that, although the Commission attempts to belittle, in its application, the significance of the amendments introduced by the 2021 Framework Regulations, those amendments are substantial, so that the resulting legal framework is not 'virtually identical' to that resulting from the 2020 Framework Regulations. On the contrary, the research derogation scheme adopted in 2021 addressed the Commission's concerns and amended in a significant manner several essential aspects of the previous scheme.

34 In that regard, the Republic of Malta states that it is not in a position to figure out whether the infringements mentioned by the Commission in its application relate to the research derogation scheme adopted in 2020 or to that adopted in 2021. The same applies to the Commission's objection as to the lack of reliance on experienced ornithologists, since that institution fails to specify whether that objection relates to the first scheme or to the second one, which brought significant improvements to make qualified ornithologists engaged and a fully integrated part of the research project, in order that the data collected be properly analysed, processed and extrapolated.

35 In its reply, the Commission observes that, according to the settled case-law of the Court, actions for failure to fulfil obligations may extend to events which took place after the reasoned opinion, only if they are of the same kind as those referred to in that opinion and constitute the same conduct, which is the case here. In the present case, the reasoned opinion of 9 June 2021 referred to the research derogation scheme adopted in 2020. The Commission indicates that in its application it had referred to that scheme, which was extended by the research derogation scheme adopted in 2021 and by the 2022 Declaration.

36 In that regard, the Commission points out that essential elements of the research derogation scheme adopted in 2020, which, according to the reasoned opinion, did not comply with Article 9(1)(b) of Directive 2009/147, were maintained in the research derogation scheme adopted in 2021 which was in force on the date on which the present action was brought. This is particularly the case as regards the objective of collecting information on the reference populations of the relevant seven species of wild finches, the licensing conditions and the scope of that scheme.

37 That continuity is evidenced by the fact that, under the 2021 Framework Regulations, licences were awarded on the basis of applications submitted under the 2020 Framework Regulations. This is why the latter regulations were 'repealed without prejudice to the validity of anything done or omitted to be done thereunder'.

38 The Commission is of the view that, contrary to the Republic of Malta's claim that there is a new 'regulatory body composed of accredited universities, qualified ornithologists and data analysts', the regulatory body responsible for research in reality remains the WBRU, which already performed that function under the 2020 Framework Regulations. The newly created possibility for the WBRU to appoint scientific experts or ornithologists would seem to be of little relevance in practice.

39 Furthermore, the Republic of Malta fails to indicate how the possibility to introduce pre-established parameters, the rules on the ascertaining of the absence of alternative solutions, the rules on the reporting of trapped birds and the conditions for research sites substantially alter the nature of the research derogation scheme of 2020.

40 The Commission contests the allegation brought forward by the Republic of Malta that the application does not identify clearly the national measures upon which the alleged failure to fulfil obligations is based. The application specifies that the contested research derogation scheme includes 'the [2020] Framework Regulations, the 2020 Declaration, the [2021] Framework Regulations and the 2021 and 2022 Declarations – and any future measures of the same kind constituting the same conduct'. In view of that clearly defined subject matter, the Republic of Malta's rights of defence were not compromised.

41 In its rejoinder, the Republic of Malta highlights the fact that the abrogation of the research derogation scheme adopted in 2020 and the adoption of a new scheme in 2021 are the direct consequence of the observations addressed to it by the Commission. That situation is quite different from a mere continuation, year after year, of the administrative practice criticised in the reasoned opinion.

42 The Republic of Malta states that the research derogation scheme adopted in 2021 differs from the previous scheme since it introduced new procedures, new bodies and new participants and strengthened the enforcement mechanisms.

43 According to the Republic of Malta, the Commission commits an error in seeing proof of continuity between the research derogation scheme adopted in 2020 and the one adopted in 2021 in the fact that the former was repealed 'without prejudice to the validity of anything done or omitted to be done thereunder'. The expression 'without prejudice', which is frequently used in Maltese legislation, serves the purpose of ensuring that ongoing judicial proceedings are not affected by the abrogation of previous laws.

44 Furthermore, in the view of the Republic of Malta, the subject matter of the Commission's application is so vast that it prevents the Republic of Malta from developing a targeted defence. The fact that the Commission confuses the research derogation schemes adopted in 2020 and in 2021 creates legal uncertainty that prevents that Member State from developing an adequate defence on the basis of clearly defined contested rules.

Findings of the Court

45 In accordance with the Court's settled case-law, the subject matter of an action under Article 258 TFEU for failure to fulfil obligations is determined by the Commission's reasoned opinion, so that the action must be based on the same grounds and pleas as that opinion (judgment of 5 April 2017, *Commission* v *Bulgaria*, C-488/15, EU:C:2017:267, paragraph 37 and the case-law cited).

46 In the present case, in the context of the present action, as in the reasoned opinion of 9 June 2021, the Commission claims that, by adopting a derogation scheme allowing the live-capturing of the relevant seven species of wild finches, the Republic of Malta has failed to fulfil its obligations under Article 5 and Article 8(1) of Directive 2009/147, read in conjunction with Article 9(1) of that directive, on the ground that the Republic of Malta, first, does not establish that its derogation scheme pursues a research objective, in so far as that scheme is not based on scientific methods, gives rise to insufficient enforcement, pursues an objective unrelated to conservation and, in any

event, is inappropriate for attaining the stated objective, second, does not justify the absence of another satisfactory solution and, third, does not demonstrate the absence of another satisfactory solution.

47 Consequently, the present action is based on the same grounds and on the same pleas as the reasoned opinion of 9 June 2021.

48 In addition, it is apparent from the Court's case-law that the question of 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 (judgment of 5 April 2017, *Commission* v *Bulgaria*, C-488/15, EU:C:2017:267, paragraph 40 and the case-law cited), namely, in the present case, on 9 July 2021.

49 However, in so far as the present action seeks to allege a systematic and persistent failure to fulfil obligations under Article 5 and Article 8(1) of Directive 2009/147, read in conjunction with Article 9(1) of that directive, it should be recalled that the production of additional evidence intended, at the stage of the proceedings before the Court, to support the proposition that the failure thus alleged is general and consistent cannot be ruled out in principle (see, by analogy, judgment of 5 April 2017, *Commission* v *Bulgaria*, C-488/15, EU:C:2017:267, paragraph 42 and the case-law cited).

50 In particular, the Court has already had occasion to state that the subject matter of an action for failure to fulfil obligations may extend to events subsequent to the reasoned opinion provided that they are of the same kind and constitute the same conduct as the events to which the opinion referred (judgment of 7 September 2023, *Commission* v *Italy (Limit values – Arsenic and fluoride)*, C-197/22, EU:C:2023:642, paragraph 53 and the case-law cited).

51 In the present case, although it is common ground that the 2021 Framework Regulations introduced amendments to the 2020 Framework Regulations, it does not appear that those amendments are relevant to the present action.

52 Indeed, the present action seeks a declaration that the derogation scheme allowing the live-capturing of the relevant seven species of wild finches infringes the obligations arising from Article 5 and Article 8(1) of Directive 2009/147, read in conjunction with Article 9(1) thereof, on the ground that the Republic of Malta, first, does not establish that the said scheme pursues a research objective, in so far as that scheme is not based on scientific methods, leads to insufficient application, pursues an objective unrelated to conservation and, in any event, is inappropriate to achieve the stated objective, second, fails to state the reasons for the absence of another satisfactory solution and, third, does not demonstrate the absence of another satisfactory solution. The mere fact that, as the Commission submits, the Republic of Malta amended its legal framework by adopting new procedures, new bodies and new participants called upon to take part in that same scheme and that it strengthened the enforcement mechanisms necessary for its implementation is not, by virtue of its general nature and in the absence of more precise information, such as to demonstrate that the research derogation scheme adopted in 2021 constitutes, in the light of the subject matter of the present action, a new derogation scheme which differs substantially from the one previously in force.

53 Furthermore, the Republic of Malta's claim that the contested derogation scheme is not clearly defined in the application is also unfounded. In fact, the derogation scheme addressed in the application includes the 2020 Framework Regulations, the 2020 Declaration, the 2021

Framework Regulations and the 2021 and 2022 Declarations, as well as any future measure of the same kind constituting the same conduct, the latter clarification being, in the present case, devoid of purpose since the Commission did not extend the subject matter of its action to measures subsequent to the 2022 Declaration.

54 Thus, the Republic of Malta's rights of defence have not been infringed. In that regard, it should also be noted that the Republic of Malta was able, as is apparent from its written pleadings, to develop a detailed line of argument with regard to the objections and arguments relied upon by the Commission.

55 Consequently, the present action is admissible.

The plea alleging failure to state reasons concerning the absence of '[an]other satisfactory solution' within the meaning of Article 9(1) of Directive 2009/147

Arguments of the parties

56 The Commission points out that the 2020 and 2021 Framework Regulations do not contain any statement of reasons as to the absence of an alternative satisfactory solution, and simply leave those statements to be made by the Minister when he or she decides on the opening of 'research periods' by means of declarations.

57 In his 2020, 2021 and 2022 Declarations, the Minister confirmed the absence of '[an]other satisfactory solution', without providing sufficiently clear reasons to satisfy the requirements of legal certainty. Those declarations describe the purpose of the research derogation scheme, which is that of collecting ring recovery data in order to determine the reference population of the relevant seven species of wild finches in the territory of the Republic of Malta. However, neither those declarations nor the documents referred to in the footnotes thereto explain why the Minister chose to pursue that objective via licensing thousands of amateurs, instead of via alternative means, such as involving qualified scientists.

58 According to the Commission, the Minister does not explain at all why the Republic of Malta chose not to involve bird-ringers from the national ringing programme or not to have recourse to other established scientific means, such as established bird population censuses, to address the identified data gaps.

59 Moreover, the Republic of Malta did not give reasons for the absence of an alternative satisfactory solution, since neither the 2020, 2021 and 2022 Declarations, nor the recommendations of the Ornis Committee, nor the WBRU reports, to which the Republic of Malta refers, address the question as to whether the participation of actual scientists constitutes an alternative satisfactory solution.

60 The Republic of Malta counters by saying that the 2020 and 2021 Framework Regulations as well as the 2020, 2021 and 2022 Declarations provide sufficient reasons to justify the absence of an alternative satisfactory solution. First, the absence of an alternative solution is expressly required by Article 9 of Directive 2009/147. Second, Regulation 6(1) of the 2021 Framework Regulations provide that the research study will have to ensure, following evaluation and analysis, that 'there is no other satisfactory solution'. Third, in the context of the 2021 research derogation scheme and during the 2020, 2021 and 2022 'research periods', the measures taken provided all the

relevant information justifying the absence of an alternative satisfactory solution. In particular, the 2020 Declaration contains an explicit reference to the recommendations of the Ornis Committee as well as references to ring recoveries covering the years 1920 to 2018 and to the report on selectivity and mesh size presented by the WBRU. Those reports form part of that declaration and provide the relevant background information as well as the detailed scientific data that justify the absence of an alternative satisfactory solution.

Findings of the Court

61 As a preliminary point, it should be noted that, as is apparent, in particular, from Article 1 of Directive 2009/147, the conservation of birds constitutes the main objective of that directive (see, to that effect, judgment of 17 March 2021, *One Voice and Ligue pour la protection des oiseaux*, C-900/19, EU:C:2021:211, paragraph 34). Thus, under Article 5(a) and (e) of that directive, Member States are to take the requisite measures to establish a general system of protection for all species of birds referred to in Article 1, prohibiting, in particular, their deliberate killing or live-capturing by any method, and the keeping of birds of species the hunting and live-capturing of which is prohibited.

62 According to Article 8(1) of that directive, as regards, inter alia, the live-capturing of birds, Member States are to prohibit the use of all means, arrangements or methods used for the large-scale or non-selective live-capturing or capable of causing the local disappearance of a species, and in particular the use of those listed in Annex IV(a) to that same directive, which refers, in particular, to nets and traps.

63 Article 9(1)(b) of Directive 2009/147 provides that Member States may derogate, inter alia, from those provisions where there is no other satisfactory solution, in particular for research purposes.

64 In that regard, 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 (judgment of 21 June 2018, *Commission* v *Malta*, C-557/15, EU:C:2018:477, paragraph 47).

65 It must also be noted, with regard to a derogation scheme, such as that provided for in Article 9 of Directive 2009/147, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions exist for each derogation, that 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 that article (judgment of 21 June 2018, *Commission* v *Malta*, C-557/15, EU:C:2018:477, paragraph 47). In addition, it is apparent from the provisions of Article 9 of Directive 2009/147, which refer to the strictly supervised conditions for the derogation set out in that article and to the selective basis on which birds are captured, and, moreover, from the general principle of proportionality, that the derogation pursuant to Article 9 of Directive 2009/147 of which a Member State intends to make use must be proportionate to the needs which justify it (judgment of 23 April 2020, *Commission* v *Finland (Spring hunting of male common eiders)*, C-217/19, EU:C:2020:291, paragraphs 66 and 67 and the case-law cited).

66 It is therefore for the Republic of Malta to establish, in compliance with the conditions established in the case-law set out in paragraphs 64 and 65 of the present judgment, that the conditions for the derogation under Article 9(1) of Directive 2009/147, on which it relied, are satisfied.

67 It should be noted that the Maltese legislation sets out the criteria for derogation in a clear and precise manner and requires the authorities responsible for their implementation to take them into account. As stated in paragraphs 8, 14 and 20 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 2020 Framework Regulations and Regulation 8 of the 2021 Framework Regulations require the Minister to verify, when a research period is opened, that there is no other satisfactory solution.

68 In contrast, it must be held that the 2020, 2021 and 2022 Declarations authorising the trapping of the relevant seven species of wild finches during the 'research periods' of 2020, 2021 and 2022 do not comply with Article 9 of Directive 2009/147.

69 It appears that those declarations, despite stating that there is not another satisfactory solution and containing an express reference to the recommendations of the Ornis Committee, do not contain any precise and adequate statement of reasons as regards such absence. In particular, in those declarations there is no mention of other standard scientific means of research in the ornithological field, whether it is for the purpose of confirming or rejecting them.

70 Consequently, the plea alleging failure to state reasons, in the derogation scheme adopted by the Republic of Malta, concerning the absence of '[an]other satisfactory solution' within the meaning of Article 9(1)(b) of Directive 2009/147, is well founded and must therefore be upheld.

71 In the light of that finding, it does not appear necessary, in the present case, to examine the pleas alleging, respectively, a failure to demonstrate the absence of another satisfactory solution and that the Maltese derogation scheme does not pursue a research objective within the meaning of Article 9(1)(b) of Directive 2009/147 (see, to that effect, judgment of 21 June 2018, *Commission* v *Malta*, C-557/15, EU:C:2018:477, paragraph 53).

72 Having regard to all of the foregoing, it must be held that, by adopting the derogation scheme allowing the live-capturing of seven species of wild finches, namely the chaffinch *(Fringilla coelebs)*, the linnet *(Carduelis cannabina)*, the goldfinch *(Carduelis carduelis)*, the greenfinch *(Carduelis chloris)*, the hawfinch *(Coccothraustes coccothraustes)*, the serin *(Serinus serinus)* and the siskin *(Carduelis spinus)*, the Republic of Malta has failed to fulfil its obligations under Article 5 and Article 8(1) of Directive 2009/147, read in conjunction with Article 9(1) of that directive.

Costs

73 Under Article 138(1) of the Rules of Procedure of the Court of Justice, 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 (First Chamber) hereby:

1. **Declares that, by adopting a derogation scheme allowing the live-capturing of seven species of wild finches, namely the chaffinch, *(Fringilla coelebs)*, the linnet *(Carduelis cannabina)*, the goldfinch *(Carduelis carduelis)*, the greenfinch *(Carduelis chloris)*, the hawfinch *(Coccothraustes coccothraustes)*, the serin *(Serinus serinus)* and the siskin *(Carduelis spinus)*, the Republic of Malta has failed to fulfil its obligations under Article 5 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.**

Arabadjiev Bay Larsen von Danwitz

Kumin Ziemele

Delivered in open court in Luxembourg on 19 September 2024.

A. Calot Escobar
Registrar

A. Arabadjiev
President of the Chamber