

## Op-Ed: “Hunting for Knowledge? The Court invalidates Malta’s Scheme for live-capturing wild Birds: balancing legal Certainty and Proportionality in the Absence of scientific Expertise (C-23/23, Commission v. Malta)”

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On 19 September 2024 the First Chamber of the Court of Justice (the ‘Court’) delivered its [judgment](#) in the infringement action brought by the Commission against Malta. The case concerns the compatibility with EU law, in particular [Directive 2009/147/EC](#) (the ‘Directive’) on the Conservation of wild birds, with Malta’s ‘Finches Project’, a regulatory scheme for the live-capturing of seven species of wild migratory finches, in derogation to the mentioned Directive, as foreseen in its Article 9. Interestingly enough, Advocate General (‘AG’) Ćapeta and the First Chamber conducted a fundamentally different analysis.

The Directive aims at a general system of protection of biodiversity in the European Union, by prohibiting killing, capturing, and keeping of wild birds (Article 5). More specifically, Article 8(1) forbids the enactment of large-scale and non-selective capture methods. However, Article 9 allows for derogations. Such exceptions can be granted for purposes of research and teaching (Article 9(1)(b)) or for capturing, keeping or other judicious use of small numbers of specimens (Article 9(1)(c)), considering economic and recreational requirements (Article 2). Such derogations are subject to strict conditions, including authorisation of specific methods, circumstances, and controls (Article 9(2)).

A first judgment delivered in 2018 condemned Malta for a previous regulatory framework that allowed live-capturing of the same species for recreational purposes. Despite such purposes being foreseen in the Directive, the knowledge gap about the population of birds impeded any assessment of the ‘small numbers’ criteria under Article 9 of the Directive.

In 2020, Malta launched a new derogation regime, using research purposes and Article 9(1)(b) as a legal basis. The Commission opened an infringement procedure, considering that such a project represented a *façade* to actually pursue the same recreational purposes of the previous, sanctioned, legal framework. Upon a reasoned opinion of the Commission sent in 2021, Malta repealed the 2020 regulatory framework and introduced a new version of the project in a new regulatory framework in 2021. However, the Commission pursued legal action before the Court of Justice considering in essence the new measure a pure continuation of the old project.

### **Procedural grounds: the limits of the infringement actions**

A first interesting aspect of this case is its procedural context. The Commission pursued this case against the 2021 regulatory framework of the Finches Project while the whole infringement procedure had been conducted against the 2020 Maltese legislation, repealed as a result of the Commission’s reasoned opinion. On one hand, the Commission advanced the argument that the new measure is simply a continuation of the previous one with purely aesthetic amendments. Malta, on the other hand, presented the novelties of the act with regard to supervisory authority and enforcement mechanisms. Both Advocate General Ćapeta and the First Chamber agreed that the action was admissible because the regulatory framework was substantially equivalent to the repealed one. In fact, the infringement procedure would lack all effectiveness if any ‘non-substantive’ legislative change (as in this case) would cause the reset of the Commission’s enforcement procedure (AG Opinion, point 45).

### **‘There and back again’: a tale of protection and derogations**

Once the admissibility of the case was declared, the Advocate General and the judges offered a fundamentally different legal analysis of the case, focusing on opposite aspects. AG Ćapeta dwelled on the

justification of this project through the lens of its research purposes. On the contrary, the First Chamber focused on the failure of Malta to state reasons concerning the absence of satisfactory alternative solutions to live-capturing of wild birds.

As in other disputes on EU environmental law, the Court is called upon to balance the best possible level of safeguard of the environment with the concrete authorisation and enactment of the derogations foreseen in EU environmental secondary law. More concretely, the Court affirms that the legislative framework advancing the derogation must abide by the principle of legal certainty. The legislation must outline ‘clearly and precisely’ the criteria for the derogation and the application mechanisms, including the authorities responsible for the ‘Project’, reaffirming what already stated in 2018. However, such an exception must be interpreted restrictively, leaving the Member State to prove that the conditions are met. In this framework, it is the principle of subsidiarity that should lead the justification, the design, and the supervision of the derogation (Judgment, points 64-65). Nevertheless, in the following points (67 to 69), the Court finds that the legislation correctly transposed the Directive. The strict requirements laid down above can be respected by the ‘legislative and regulatory framework’ as a whole, therefore, not necessarily at the legislative level. And in this case, the Declarations authorising the trapping of the finches in 2020, 2021 and 2022 lack ‘any precise and adequate statement of reasons as regards’ another satisfactory solution and other standard scientific means to advance the research purposes outlined.

### **Research purposes and lack of expertise before the Court. A soon-to-be trilogy?**

The Court decided not to deal with the first substantial problematic point of the project: its alleged research purposes. As AG Ćapeta explains, such activities constitute a long tradition in this Mediterranean state. This plea proved to be problematic on several levels. First, despite offering a derogation for research purposes, the Directive does not give any meaning of such purposes. As a result, the Advocate General offers her own position, including a comparison with the case law of the International Court of Justice on the legal definition of a research project (AG Opinion, points 58-61). Second, the Opinion acknowledges that Malta has not given any arguments on how such

research (collection of information on the origins of migratory birds) would benefit the objectives of the Directive, might them be conservation of biodiversity or safeguard of economic and recreational dimensions as well (AG Opinion, point 74). On the contrary, certain elements seemed to suggest to the Advocate General a purely continuation of harmful capturing activities (AG Opinion, points 90, 93, 94, 98).

However, the Court has carefully avoided making the same thorough assessment of the research purposes. It should be noted that in several passages of her Opinion, the Advocate General acknowledged that the Court lacks information on specific scientific knowledge, e.g., the necessary training to handle bird capturing. Moreover, the absence of arguments of ornithology experts who, at national level, boycotted the Finches Project on ethics grounds, certainly did not fill such a knowledge gap in the procedure of the Court.

By way of conclusion, one might think that this case left many gaps in the pursuit of knowledge. And if it is true what AG Ćapeta states in her Opinion (point 2), that Malta embraced a famous cinematic line of not minding ‘a reasonable amount of trouble’, the small Republic might pursue its plans and lead the Court to hunt for such knowledge (gap) and finally judge on ‘research purposes’.

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