



Report to DG ENV highlighting concerns on application of derogation for the trapping of seven finch species in Malta in defiance of ECJ court ruling (Case C-557/15 – dd. 21.06.18) and in conjunction with derogation for the trapping of Golden Plover and Song Thrush

**A request for immediate suspension of proposed derogatory periods**

**22 October 2020**

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## List of Annexes

- Annex A Draft minutes of Ornis Committee meeting of the 26<sup>th</sup> August 2020 (Still awaiting official approval but these were circulated by Ornis Secretary Richard Lia)
- Annex B Public Consultation Outcome report
- Annex C Legal Notice 376 of 2020 – Declaration on a Derogation for an Autumn 2020 Live-capturing Season for Song Thrush and Golden Plover
- Annex D Legal Notice 399 of 2020 - Framework Regulations for Allowing a Research Derogation to determine Malta's Reference Population of Seven Finch Species
- Annex E Legal Notice 400 of 2020 - Declaration on a Derogation allowing a Research Period to determine Malta's Reference Population of Seven Finch Species
- Annex F Data on all known ring recoveries for finches in Malta (1933 – 2020)
- Annex G Email from Ornis Secretary with copy of letter & application form sent to trappers on 24 August 2020
- Annex H Copy of photo leaked by trapper of examination paper used to test research skills of trappers
- Annex I Email from BLM to WBRU with queries on derogations
- Annex J Correspondence with Environment Protection Unit within Malta Police Force requesting clarifications on locations of trapping/research sites
- Annex K Stibbe Advocates and Associates' MEMO to WBRU on the possibilities of applying an Article 9(1) derogation

# 1. INTRODUCTION

The European Court of Justice (ECJ) ruling issued on the 21<sup>st</sup> June 2018 was clear and unequivocal in finding Malta guilty of not abiding by Articles 5(a) & (e), and in the application of Article 8(1) and Article 9(1) of the Birds Directive. In a nutshell, it had concluded that the trapping season for finches allowed in Malta in between 2014 and 2017 constituted a form of deliberate killing and capture of wild birds for the purposes of keeping, using unsustainable means (clap nets) for which the conditions of no suitable alternatives, judicious use, capture in small numbers and strict supervision could not be proven.

The ruling follows a long saga in Malta attempting to hold on to the practice of trapping wild birds. Accession treaty agreements meant that Malta had to phase out the practice by the end of 2008 and not allow any new licences for trapping. As of 2009, the practice still survived under the guise of various derogations for huntable species, up until infringement proceedings initiated in 2011, guided the way to permit only a single (double-species) derogation for the trapping of Golden Plover and Song Thrush from 2012 onwards. To our knowledge, the infringement procedure remained open since.

The Maltese government, under a new administration in 2013, forged ahead a renewed push to the practice, allowing a new intake of trapping licences which reversed the natural decline in trapping licences still valid since 2008, and reintroducing finch trapping until this was eventually halted at the European Court of Justice. While such a verdict was expected to have ramifications to the other trapping derogation, in subsequent years (2018 and 2019) Malta continued to derogate indiscriminately for the trapping of Song Thrush and Golden Plover, with further amendments to the framework legislation and applicable seasons oriented to appease the demands and concerns of the (stronger) trapping community. Measures that had been adopted in reaction to the ECJ verdict (specifically that of increasing mesh size), were eventually reversed, and the trapping season further extended by 10 days. As we had reported to DG ENV in November 2019 (BirdLife Malta, 2019), no sound justifications for such amendments were provided and as we have demonstrated, the season had a higher risk of resulting in the catching of non-target species. In other words, the derogation kept especially being used as a loophole for the continuation of finch trapping.

With the political situation in Malta towards the end of 2019 leading up to a change in its prime minister, a new leader was elected in January 2020. Two days prior to being elected, Prime Minister Abela promised his followers that he would do everything possible to re-open a finch trapping season in October (Abela R., 2020). Since Abela has been at the helm of the country, a continued degradation of hunting and trapping practices has prevailed. This started with a shift in hunting and trapping governance from the Environment Ministry to the Gozo (regional) Ministry under Minister Clint Camilleri<sup>1</sup> (see our Press Release of 25 Feb 2020); the opening of a spring hunting derogation for Common Quail during peak Turtle-dove migration while enforcement resources were dedicated to the Covid-19 pandemic hitting Malta (see our Press Releases of 22 Mar, 27 Mar & 30 Apr 2020); amendments to conservation of wild birds regulations which now enable hunters and trappers to become bird ringers, and hunting to be carried out all year long on released specimens of Galliformes (Legal Notice 367 of 2020). Recently we have just experienced the worst autumn hunting season on record with enforcement resources kept at their bare minimum while casualties concerning shot protected species peaked over the past few weeks (See our Press Release of 24 Sep 2020<sup>2</sup>).

Discussions at Malta's Ornithological Committee concerning the upcoming derogation for finches were held during an online meeting in August 2020, resulting in a recommendation to the Minister (of Gozo) to apply the derogation in question under Article 9(1)b of the Birds Directive rather than the usual Article 9(1)c derogations

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<sup>1</sup> We are contesting this matter in our Local Courts since the law specifically calls on the Minister of Environment to administer the Conservation of Wild Birds Regulations and not the Minister of Gozo who is a hunter and trapper himself.

<sup>2</sup> Links to press releases included in References

sought for hunting and trapping. Aware that political direction was to apply this derogation irrespective of opinions or objections voiced by Ornis members, BirdLife Malta retracted from proposing any amendments to the derogation, which at face value appeared to be nothing more than a way of allowing trappers to once again trap finches in 2020. Draft minutes of this meeting are included in Annex A to this document. During the discussion, FKNK proposed the use of pre-recorded bird calls for the research derogation for the reasons that finches trapped in 2014 to 2017 would have by now nearly all died. This was also accepted and included. The Ornis Committee approved the proposed draft legislations following which a public consultation exercise was held and answered to (Annex B).

Applications for licences to trap and to research finches were subsequently accepted by the Wild Birds Regulation by early September, and with Legal Notice 376 of 2020 (Government of Malta, 2020) published authorising the opening of a Golden Plover/Song Thrush trapping season between the 20<sup>th</sup> October and 10<sup>th</sup> January (Annex C), the publication of both framework regulations and this year's derogation have been issued as Legal Notices 399 and 400 of 2020 on the 19<sup>th</sup> October 2020 (included as Annex D and E). Only trapping licence holders were invited to participate in this derogation given this is practically the solution for trappers to continue somewhat trapping finches.

BirdLife Malta firmly and wholeheartedly believes that as set, this derogation shall result in the deliberate mass capture (killing) of finches in Malta starting from the 20<sup>th</sup> October 2020. Furthermore, the proposed conditions of the Article 9(1)b derogation shall aggravate further the methods employed and controls in place to trap Golden Plover and Song Thrush. Both practices shall be permitted during the same period, at same locations, and by the same licence holders. While one derogation presents some restrictions (which have not been enforced adequately in past years), the Article 9(1)b derogation shall be permitting the free use of electronic bird callers, unlimited number of live decoys, and no need to declare catches on the same trapping sites.

***This document intends to lay out how the proposed derogation is not a true research derogation, but rather a trapping one (Article 9(1)c and not Article 9(1)b) which defies the ruling of the European Court of Justice of the 21<sup>st</sup> June 2018. We highlight how such a derogation is simply an excuse to allow Malta's trappers to resume once again with finch trapping, and how ultimately the proposed system is destined to fail, resulting in the deliberate capture and killing of thousands of protected finches in the coming days, and ultimately an easing of restrictions on the Golden Plover and Song Thrush trapping derogation, which shall guarantee even more deliberate capture of Golden Plover, Song Thrush and other bird species throughout the period.***



***For such reasons we believe there is enough justification for DG ENV and for the European Court of Justice to demand an immediate halt to both derogations.***

Figure 1: A Facebook post by MEP Alex Agius Saliba posted on the 20<sup>th</sup> October 2020. Known for his openly declared support to hunters and trappers, Saliba's post epitomises what this derogation is all about – not a research one, but a trapping one gifted to trappers by the current administration. Translating from Maltese the post says: "Today is start of the **trapping** period on the seven finch species. I augur to my fellow trappers a good migration and invite them to always abide by the rules. Enjoy your pastime my friends!"

## 2. RATIONALE BEHIND PROPOSED DEROGATION IS FOR EVENTUAL APPLICATION OF ARTICLE 9(1)C, IGNORING ALTERNATIVES

Article 31 of the ECJ verdict summarises in order of priority the failures of the 2014-2017 finch derogation as follows:

- 1) Failed to establish the absence of another satisfactory solution
- 2) Failed to state the reason why it could not demonstrate there is no other satisfactory solution
- 3) Failed to demonstrate that the trapping of finches is a form of judicious use
- 4) Failed to show that the derogation resulted in the capture of small numbers
- 5) Failed to show that the derogation was strictly supervised

The rationale behind the proposed 2020 finch derogation is laid out in clause 2 of the framework regulations (Annex D) which state particularly:

*“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 the Birds Directive that complies with the “small numbers”-criterion as interpreted by the Court of Justice in its C-557/15 judgment.”*

The rationale behind the proposed derogation is allegedly to provide further scientific information to justify an eventual Article 9(1)c derogation for the trapping of finches – the same derogation that was considered unlawful by the ECJ verdict. The motivation for seeking this derogation therefore appears to be singularly towards targeting the small numbers criterion, ignoring the other four issues which would need to be satisfied if Malta had to correctly apply a derogation for the trapping of finches (which is ultimately the aim of this measure). So, while derogations of a scientific nature normally aim to help the species, they are actually targeting making any pressures in the species during same derogation justifiable, in this case tens of thousands of finches will be trapped to try and gather data which will solidify Malta’s chances of reapplying another trapping derogation of the same species. This definitely is not justifiable.

During Ornis Committee deliberations, and in the proposed legislation itself there have been no attempts to present any other suitable alternatives to an eventual application of an Article 9(1)c derogation. Rather the proposed Article 9(1)b derogation has been presented and approved as a possibly suitable variant to allow trappers to catch their finches this October. This is irrespective of the fact that captive breeding of finches could still remain a viable alternative to the eventual application of an Article 9(1)c derogation, therefore eliminating the need to apply this Article 9(1)b derogation (Clause 38 of ECJ). We are not aware that Malta has to date proven any arguments contrary to the fact that captive breeding of finches may be an alternative to trapping. Indeed, no alternatives have been discussed by the Ornis Committee on which we sit, or rather, no assessment of alternatives appear to have been deliberated or referred to by the proposed legislation. Such a shortcoming was also highlighted in Clause 52 of the ECJ verdict – and the same situation is hereby being repeated.

***In applying this Article 9(1)b derogation to seek to answer the small numbers criterion (in order to apply a future Article 9(1)c derogation) is therefore a measure to enable trappers to once again in 2020 be able to catch finches, given that the Maltese government has no intention or means to explore any other satisfactory solution to the trapping of finches. The ultimate aim of this derogation, as confirmed by issued legislation itself remains that of the capture and keeping of finches and therefore remains in principle a move towards reapplying the same Article 9(1)c derogation without attempting to seek any alternative solutions.***

## 3.0 THE PROPOSED DEROGATION IS NOT A RESEARCH DEROGATION

The issued framework regulations (Annex D) and declaration of season (Annex E), present the upcoming period concerning finches as one applicable under Article 9(1)b of the Birds Directive, namely recalling the possibility that:

*Malta ...” may derogate from the provisions of Articles 5 to 8, where there is no other satisfactory solution...for the purposes of research and teaching...”*

The same provisions are recalled in quoting sub-regulation 9(1)(e) of the Conservation of Wild Birds Regulations.

The framework regulations enacted today, and the subsidiary legislation opening the period propose the following set-up:

1. An open season during the period 20<sup>th</sup> October to 20<sup>th</sup> December (capture allowed from 2hrs before sunrise to 2hrs after sunset)
2. Using clap nets to capture finches for the stated purposes of: (i) control; (ii) fitting scientific rings & (iii) fitting satellite tags
3. Using clap nets which are (i) no less than 18mm by 18mm mesh size; (ii) do not have an area exceeding 38 square metres
4. And are located at a WBRU-approved ‘research site’ with one pair of clap-nets allowed per registered site, however if operator has a Golden Plover/Song Thrush trapping licence a second clap-net for such purposes shall be allowed.
5. Captured finches need to be released back into the wild.  
The number of caught birds does not need to be registered except in the case where:
  - a. A bird is a recovery (has a ring) the ring details are to be noted on a form to be returned to WBRU by a date that still has to be determined.
  - b. Alternatively, the bird may be ringed
  - c. Or even satellite-tagged
6. Licenced persons to be trappers in possession of a general (trapping) licence who: (i) attend a mandatory course and (ii) pass an examination issued by WBRU
7. Trappers may use pre-recorded bird calls for finches
8. Trappers may use an unlimited number of live-decoys as long as these have single use rings from WBRU marked R16U, have closed rings or are mules/hybrids.
9. Season to be policed by around 50 officers during open season hours, and 4 officers outside season hours
10. Coordinates of authorised clap-net pairs to be published by the Wild Birds Regulation Unit at least 3 days before the start of the research period and shall be available on-line at all times during the research period.

The questionable rationale has been argued in Section 2.0, however if one had to recall the above conditions as an Article 9(1b) research derogation for furthering more scientific data to answer the small numbers criterion, a number of shortcomings become evident as presented hereunder.

### *3.1 Research objectives are biased*

Ultimately the reason why the Maltese government wishes to apply such a derogation is to amplify further the source populations of finches which have been questioned at ECJ verdict. The hope is that this might result



in an increased number of recoveries from European countries when compared to those documented by Raine (2007), and in so doing be able to work out some form of sustainable number that can be trapped/killed for these protected finch species.

The logic promulgated in this derogatory period is one where the higher the number of birds that may be caught, the higher the likelihood that a recovery might be found, and therefore the more likelihood an eventual application of Article 9(1)c may be justifiable. This could be the rationale why so much of the derogation conditions are being let loose – from an unlimited number of decoys, use of pre-recorded bird calls and a derogation open to up to 4,500 licence holders (as per latest statistics of general trapping licence holders in WBRU’s 2019 Game Reporting Data Report (WBRU, 2019b)). The season is conceding the highest possible effort to catch finches.

It is normal practice that in such research undertakings, a suitable theorem is devised and a suitable conservation-aimed question is attempted to be fulfilled, if one had to view such research as being justifiable. The flawed objectives of such research have been recently even questioned by ex-Malta Ornis Committee Chairman Prof. Mark-Anthony Falzon (Falzon M.A., 2020).

*The objective of this so called ‘research’ is undoubtedly that to allow the birds to be trapped in the future – a somewhat twisted way at looking at the conservation needs of such protected species. Both the EU Birds Directive and local regulations transposing it, garner the spirit of conservation and protection of bird species, and normally derogations for research are applicable where such result in further knowledge on the species. In this case the ultimate objective is to determine a number to be able to catch protected species.*

### **3.2 Other alternatives have been discarded**

Given the biased research objective is one where effort needs to be maximised to obtain ring recoveries, the arguments put forward at Ornis Committee by Maltese authorities are that past recovery records have not provided a suitable insight into the source populations of finches migrating over Malta. This is especially in the case of Hawfinch *Coccothraustes coccothraustes* wherein no known ring recoveries are known from Malta, and attempts to use Italian Bird Atlas data (Spina & Volponi, 2008) were not considered justifiable at ECJ stage.

One must note that according to information traced by BirdLife Malta’s Ringing Scheme (and included with this report as Annex F), the total number of ring recoveries for finches stands at a total of 121 birds with the earliest record being in 1933 and the latest being in 2017. Such birds originated from a total of 18 countries in Europe and 1 in Africa (Austria, Croatia, Czech Republic, England, Germany, Hungary, Italy, Latvia, Lithuania, Netherlands, Norway, Poland, Russia, Scotland, Slovakia, Slovenia, Switzerland, Ukraine and Tunisia) and cannot be discarded as not being the best available information to date concerning source populations of finches migrating to Malta.

While most of this data, had indeed been sourced mostly by trappers themselves over past years, it is interesting to note that despite trappers having had an obligation to report ring recoveries during the period when finch trapping seasons were opened between 2014 and 2017, only 2 recoveries were reported by WBRU to this effect (WBRU 2015, 2016, 2017, 2018). Assuming trappers did not shy away from reporting any recoveries during such a period, and in consideration of the thousands of finches that have been trapped during open seasons pre-EU accession and during the period 2014 to 2017, it is evident that the chances of recoveries are low, and that allowing a gargantuan catch effort should not yield any significant shift in such results. This is even more proven by the fact that between 2014 and 2017 seasons, only the Hawfinch was caught up to quota and less than 7% of trappers ever reached their individual bag limits. This means that although the current derogation does not oblige any quotas, if the reporting of past years is anything to go by, then it is expected that there will be any significant increase in the number of birds that shall be trapped



this year. Then again as we explain further, WBRU has not obliged trappers to record their catches – only to report ring recoveries.

During the Ornis Committee meeting of the 26<sup>th</sup> August 2020, WBRU were questioned as to what would be the ideal number of finches that need to be controlled for this to be considered robust data (Point 2.1 of Ornis Committee meeting minutes of 26.08.2020 – Annex A). The Ornis Secretary/Head of WBRU did not provide a concrete answer, but rather pointed out that the legal advice sought by the same WBRU pointed to the more the merrier kind of solution.

*It is very evident therefore that:*

- (i) increasing the catch effort on finches is not expected to yield any significant ring recoveries;*
- (ii) while the Maltese authorities are not accepting the current scientific ring recovery data as satisfactorily indicating the source populations, there is no indication for how long or how extensive catch effort will be required in future years to determine such source population.*

*Indeed, the no other satisfactory solution for the application of this Article 9(1)b derogation simply relies on Maltese authorities not accepting the science dictated by 87 years of data (1933 – 2020); and Regulation 4 of the Framework Regulations which gives the onus to the competent Minister who ascertains (how?) that no other satisfactory solution exists to this derogation<sup>3</sup>.*

### **3.3 Objectives of proposed derogation are just on paper**

Despite the proposed legislation placing a number of other possible measures to determine the source populations of finches, from discussions held at Ornis Committee level, and from what has been incorporated within legislation, it is very evident that Maltese authorities have written such methods in the legal notices not with the intent of investing in them but rather to sugar-coat this derogation so as not to appear to be an outright trapping derogation.

One cannot help but note the limitations of proposing the use of satellite tags on finches. To date technology does not permit the use of satellite transmitters on finches given the fact that such transmitters have not yet been produced at a total mass which would not exceed the recommended limit of 3% of a finch's body weight. This limitation was known at the time of drafting of such legislation, and was also pointed out during the respective Ornis Committee meeting. Quoting Point 5.24 of the Ornis Committee meeting of the 26<sup>th</sup> August:

*“The Secretary explained that since there is a likelihood such tags will be available in the market, justifies retaining this provision in the proposed legislation rather than leaving it as an afterthought.”*

Incidentally the original draft regulation circulated and approved at Ornis Committee level even incorporated the definition of “satellite tagging (geolocators)” clearly showing a poor understanding of these two completely different methodologies, and confirming that such terminology has been included in legislation for convenience rather than intention. Satellite tagging of birds relays live feeds of a bird's location without the need to retrieve the bird; whereas a geolocator would require a bird to be retrieved to download its location data – something virtually impossible given the recovery rates of the finches in question. It is also relevant to point out that tagging birds in Malta would give us where they would be wintering after continuing migrating south with less chance of knowing where they will return in spring nearly a year after being tagged. We fear that if this derogation is not challenged, WBRU and FKNK shall be pressing for such a research period to open during the spring season – with the excuse that birds migrating over Malta would be directly reaching their breeding grounds and hence such data would have more value. This would be detrimental to wild finch populations being exerted through such an impact on their pre-nuptial migration.

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<sup>3</sup> That deliberations and discussions at Ornis Committee level do not suffice as a clear and sufficient statement of reasons for a lack of alternatives, has already been mentioned in the ECJ ruling (Clause 35).

The third intended use for justifying the use of clap nets is one concerning the possible scientific ringing of caught birds. In various online meetings held between WBRU and BirdLife Malta's Head of Ringing Scheme following the Ornithology Committee meeting of the 26<sup>th</sup> August, discussions were held on the possibility of bird ringers making use of birds caught by trappers so these could be fitted with scientific EURING approved rings. These discussions started too late (indeed after trappers were already invited to apply for this derogation) and we wonder why WBRU who had been designing this derogation for over a year, never liaised with a major stakeholder like the BirdLife Malta Ringing Scheme at planning stage rather than a few weeks before the planned start of the season. Various difficulties however were encountered in such a prospective setup given that the methodology being allowed by WBRU to 'control' finches makes use of various methods which are not endorsed by the ringing scheme – particularly the use of live-decoys and the disproportionate amount of clap-nets which would be catching finches on their migration resulting in a significant disturbance to such wild bird populations. In further discussions which were held with FKNK, it also became eventually evident that the trapping community was reluctant to have any personnel associated with the ringing scheme or with BirdLife Malta at respective trapping sites, with FKNK suggesting to BirdLife Malta to issue a call itself to trappers to see who would be willing to take a bird ringer on their respective trapping site. At the end, in view of the non-existent scientific value of this derogation, the late approach by WBRU and the reluctance of the hunting and trapping federation, the ringing scheme had no other option but to opt out of the proposed derogation. The motive behind this effort looked increasingly in favour of finding a manner by which to allow trappers to catch birds, rather than to partake any scientific exercise from this derogation. It is our understanding that no scientific ringing shall accordingly be taking place during the derogatory period other than the standard ringing efforts exerted by licenced ringers which cover the scope of research of other species including finches. To date, we can confirm that the BirdLife Malta Ringing Scheme has not been approached by anyone requesting to provide any scientific rings for the derogation period.

*In other words, it is evident that Regulation 3 of the framework regulations is authorising the use of clap-nets to trap finches, without the intent to use satellite tags as it is simply impossible to operate such devices on finches, and likewise for the use of trapping sites to conduct scientific ringing. Indeed, bird ringers already exert that function without the need of trappers clap netting finches.*

***Ultimately the objective of this derogation is the clap-netting of finches, for which we maintain that given the chances of ring recoveries are low, given WBRU has clearly steered off any other alternative means while sugar-coating the intent with methods it will not delve to employ, the derogation is not one intended for the control of finches but one for their deliberate capture. A look into the methodologies (as presented in the next section) shall put this into perspective.***

### ***3.4 Methods employed shall lead to the deliberate capture of finches not research***

#### ***3.4.1 Trappers are not researchers and they have not been trained to be***

In its preparation for this derogation, WBRU opened up the possibility for general trapping licence holders (only) to apply for the research licence by sending a communication to all trappers on the 24<sup>th</sup> August 2020 – two days ahead of the Ornithology Committee meeting of the 26<sup>th</sup> August 2020, the meeting which was intended to discuss and vote upon the conditions of the proposed derogation. The communication sent to trappers (reproduced as Annex G after BLM queried WBRU on whether it had communicated to trappers already) had already indicated the conditions of the derogation as being one for a season open between the 20<sup>th</sup> October to the 20<sup>th</sup> December, and going as far as specifying the kind of 'single-use' rings which would be permitted for finches held at trapping sites (we touch on this point later on). *That the intention of this derogation is to somehow allow trappers to catch finches has already been disputed in section 2.0. The above-mentioned*

*communication to trappers, and the opening of this research derogation only to trapping licence holders is further proof of this.*

Accordingly, WBRU has relied on the good intentions of trappers, the same community of trappers which feels aggrieved by the ECJ decision of 2018, to now resort to conducting research on these species. In its arguments voiced at ECJ level, and reproduced in clause 43 of the ECJ verdict, Malta had maintained that: “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(l)(c) of Directive 2009/147.” This is again repeated in clause 44 of the ECJ verdict wherein Malta is quoted as not even having considered the capture and release of finches as being somewhat satisfactory in relation to the practice of catching and keeping.

WBRU’s solution to convert such an ‘integral tradition’ is by having trappers sign an application form with various clauses, give them a training session and subject them to a short exam. Details of the examination paper had been leaked on Facebook by a trapper himself on the 24<sup>th</sup> September 2020 after taking a photo of the paper (included in Annex H). It appears that WBRU has given licences to individuals who were subject to a total of six questions. The first one required trappers to write out the numbers on a bird ring from a photo, with the remaining five translated and reproduced hereunder:

- Question 2: The research period for finches shall be between the 20<sup>th</sup> October to the 20<sup>th</sup> December YES/NO  
Question 3: Can I use birds bearing rings R16U YES/NO  
Question 4: Can I used birds bearing rings WBRU14 or 15-RU YES/NO  
Question 5: Can I use pre-recorded bird calls YES/NO  
Question 6: The form for ring recoveries needs to be returned to Maltapost in January after the closure of the season YES/NO

Practically the correct answers to such questions would be all YES except for question 4.

At the time of writing the number of trappers who showed interest in the research licence, those who sat for the exam, and the proportion of whom passed the exam and obtained the licence, is unknown. A number of queries on this derogation sent to WBRU on the 15<sup>th</sup> October 2020 (included as Annex I) have not been answered yet.

It is however estimated that a significant amount of research licences numbering slightly less than the 3,715 active finch trapping licences of 2017, are active for the current season. The great majority of trapping licence holders have always been more oriented towards finches rather than golden plover and song thrush.

#### *3.4.2 The number of licences and consequently trapping/research sites is too large*

As set in the respective regulations, trappers have been allowed to register a clap-net each for the purposes of this research derogation. The number of active research sites for the season is therefore estimated to be somewhat in the region of 3,000 sites (assuming some licensees may resort to using the same site) scattered along coastal areas of Malta and Gozo, on previously registered trapping sites for finch trapping (under 2014-17 derogations) or for Song Thrush/Golden Plover trapping in more recent years.

Needless to point out, the catching effort of circa 3,000 clap nets spanning a maximum of 38 square metres each amounts to a possible maximum catch effort expended over a total of 114,000 square metres for a period of two months, every day all day long.

This can be hardly considered as being any form of a sound research undertaking. That clap-nets are not a selective means of capture have been upheld by the ECJ ruling itself (vide clauses 84 and 86). What this means in practical terms is that such clap nets shall be trapping flocks of migrating finches and other species along the Maltese Islands coastline along their whole trajectory North to South. In the eventuality that such birds

are indeed released back into the wild, these birds will be possibly trapped again and again until they manage to make it off the Maltese Islands, should they survive such a stressful undertaking and not be caged. The stress caused with this massive exaggerated approach of catching finches is even worse when one considers that the success rate of catching controls is very low. To add insult to injury this is all being done to get data to then use it to open further rapping seasons in the future and not to help the conservation of the same species. This cannot be acceptable in anyone's eyes especially those that are bound to safeguard the Birds directive and the spirit in which it was written.

Such concerns were voiced by various in the public consultation exercised summarised by a report included in Annex B. The response to such a possibility of birds being re-trapped multiple times is answered by WBRU in a totally unfounded, folk-style answer recalling sayings by trappers on the matter:

*“Live-catchers have ample experience in handling birds as do bird-ringers. It is assumed that the concern on high density is referring to the assumption that finches will be stressed by being recaptured repeatedly. The likelihood that a bird is recaptured by means of a clap-net system (mansab) in a successive manner is quite unlikely and there is a very obvious reason for this. The clap-net system is a much more visible contraption than the mist-net system. Birds released after being caught by means of the former method will shy away from approaching another clap-net pair. By the time released specimens 'forget' the clap-nets they would, in all likelihood, already have arrived in their wintering grounds. There are also local sayings that corroborate this, such as "jafu l-iskola" or "għandhom qelba", which in essence sum up the shying away of birds from the clap-net system if they were previously caught. On the other hand, birds caught in a mist-net are very likely to be recaptured in another mist-net since they are purposely manufactured to be rendered practically invisible and hence undetected.”*

#### **3.4.3 Pre-recorded bird calls and an unlimited number of live-decoys shall ensure no finch is unscathed**

The matter is further exacerbated with the permitted use of pre-recorded bird calls and an unlimited number of live decoys on trapping sites – two conditions which have never been permitted with such liberty and impunity in previous years. Migrating finches are indeed attracted to trapping sites by means of calls and visual recognition of their similars. Multiply this over 3000 trapping stations and the impact on migratory flocks of finches becomes very evident.

***We believe that the number of trappers allowed to practice this derogation, the number and overall resulting area of trapping/research stations in question, the indiscriminate and uncontrolled use of pre-recorded bird calls and live-decoys as are being permitted in this derogation, are in breach of Article 5 of the Directive particularly clause (d) on the deliberate disturbance on top of the risks imposed by such activity in contrast with clauses (a) and (e).***

One has to also recall the fact that at least 5 of the target 7 finch species<sup>4</sup> targeted by this derogation are considered as occasional breeders, and that therefore such a gargantuan disturbance will undoubtedly impact any resident birds attempting to establish breeding populations. Such findings are corroborated by Malta's 2018 Breeding Bird Atlas (WBRU, 2019a).

#### **3.4.4 Trappers shall be catching and keeping finches with ample means of not being detected**

In the previous sections 3.4.1 to 3.4.3 we have established that trappers are by far not converted to changing their traditional practices by a simple licencing exercise from WBRU. We have also explored the fact that the methods employed during this derogation shall result in the capture of thousands of finches further aided with

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<sup>4</sup> Common Linnet, European Goldfinch, European Greenfinch, European Serin & Common Chaffinch

the use of pre-recorded bird calls and unlimited number of decoys, with such an effort expanded over a span of two months over thousands of trapping/research sites that can be active daily.

It is not a coincidence therefore that trappers have been notified on what rings shall be permitted to be used during the period two months ahead by WBRU in the letter sent to them on the 24<sup>th</sup> August. We firmly believe this has been done intentionally by WBRU, giving ample time for trappers to prepare ahead for this derogation in time.

According to the framework regulations, the single use-ring for live-decoys are governed by the following:

Definition:

*"single-use ring" means, for the purpose of these regulations, rings that were issued by the Wild Birds Regulation*

*Unit in 2016 and 2017, bearing code R16U \*\*;*

*\*\*No new or replacement single-use rings will be supplied to licensees. These rings have been audited by an independent Notary Public and are stored for the purpose of future audits as and when required*

Regulation 7(k) [every licence shall] *"limit the use of live-decoys to birds from the relevant species that were fitted with a single-use ring issued by the Wild Birds Regulation Unit bearing code R16U, to their colour mutations (colour-variants) fitted with a closed ring and to mules and, or hybrids:"*

Any live decoys bearing rings not specified as above would accordingly be penalised.

A number of scenarios become evident over the shortcomings of both definition and regulations concerning the use of live decoys:

#### **A. Rings distributed in 2016 and 2017 regulations may be re-utilised**

That the WBRU has in past derogations not collected back all unused WBRU rings issued during the 2016 and 2017 finch trapping derogations are reported in its own derogation reports. These amount to at least 434 unaccounted rings from the 2016 derogation and a further 457 unaccounted rings from the 2017 derogation. Apart from this, and as we have demonstrated way back in our video sent to DG ENV in July 2015<sup>5</sup>, single-use rings used by WBRU in the past can be re-used multiple times before they actually break. Therefore, there is a real risk that rings used for birds caught in 2016 and 2017 may somehow find their way to being utilised once again in 2020. It is a known fact that trapped finches do not have a very long lifetime in captivity (hence the need to capture more). Between 2016 and 2017, at least 15,914 rings with the inscription R16U were used up by trappers for their caught finches. WBRU never requested such rings to be returned to it after the bird is lost, and therefore one cannot discount the potential that a good number of rings in some usable form are still in circulation, ready to be fitted on finches to be caught in the coming weeks.

#### **B. Rings bearing inscription R16U have been purchased possibly in thousands**

Over the past weeks, BirdLife Malta has been contacted by various anonymous persons implying that rings bearing the inscriptions R16U had already been making the rounds amongst trappers and being sold at hefty prices. Indeed, searches conducted over the internet point to a number of purchases having been done by Maltese persons over China-based websites such as aliexpress.com. A screenshot taken on the 19<sup>th</sup> October 2020 after conducting a search on aliexpress.com for R16U rings even denotes two 5-star reviews posted from Malta on the 16<sup>th</sup> October 2020 (Figures 1 and 2). The volume of such brand new single-use R16U rings in circulation in Malta at the moment cannot be estimated but could easily number into thousands. The supplier denotes on his portal at least 74 purchases of lots of 100, though it cannot be ascertained that these were only purchased by Maltese buyers.

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<sup>5</sup> Appendix 7 of our July 2015 report on the 2014 finch trapping derogation (BLM, 2015b)





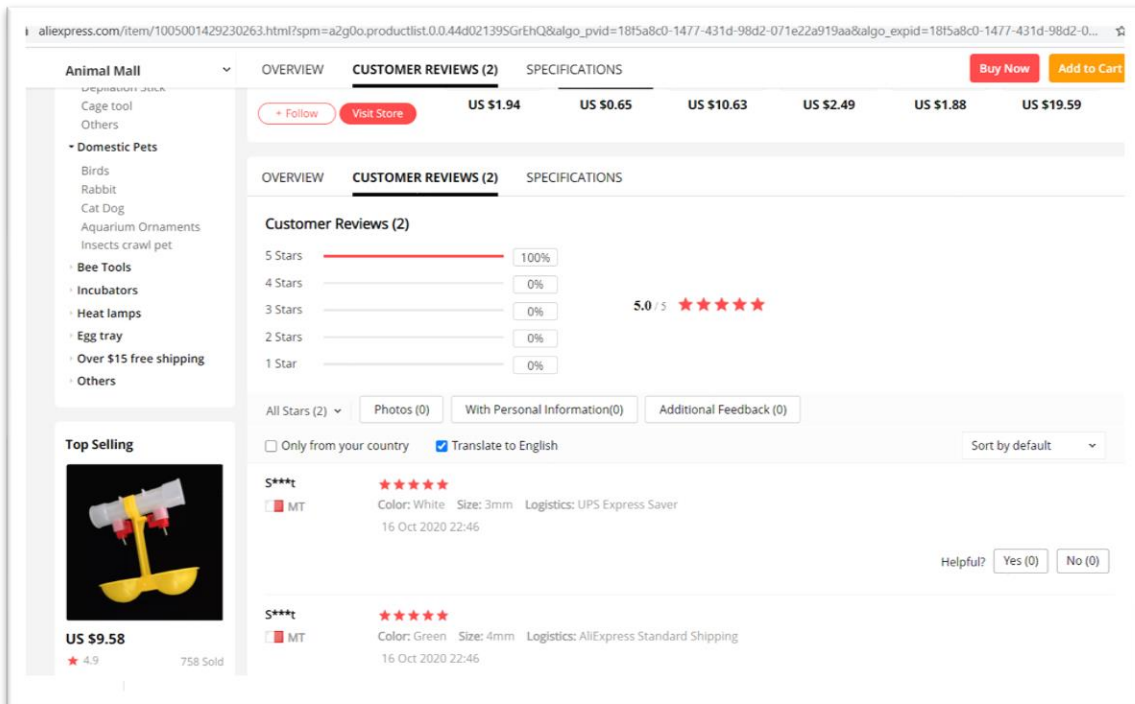


Figure 3: Screenshot take from aliexpress.com of purchases of single-use plastic bird rings with R16U inscriptions. Two reviews were left by a supplier based in Malta who appears to have purchase white coloured rings with 3mm diameter, and green coloured rings with 4mm diameter

Table 5 – Special single-use rings

Ring colour	Species	Quantities supplied to licensees
White	Linnet, Chaffinch, Serin, Siskin and Goldfinch	27,631
Green	Greenfinch	5,022
Metal	Hawfinch	4,390
	<b>Total</b>	<b>37,043</b>

Source: Wild Birds Regulation Unit, 2017

Figure 2: 2017 single-use rings for finches



Figure 4: Section from WBRU's 2017 finch trapping derogation report, reporting and portraying the rings permitted for use on trapped finches at the time - similar to the ones unknown persons have purchased to Malta in 2020



## WHY THIS IS NOT A RESEARCH DEROGATION

As we have demonstrated in this chapter, the framework regulations issued on the 19<sup>th</sup> October by Maltese authorities do not constitute a research derogation for the following demonstrated reasons:

- The derogation is not aimed at improving knowledge to conserve the species in question, but is aimed at somehow resolving a yield for the future trapping of finches which is satisfactory to Maltese authorities. This is because while Maltese authorities did not delve into finding suitable alternatives to trapping of finches, it considers 87 years of ring recovery data as insufficient, and considers the only solution as being the mass-capture of finches to yield an unknown number of ring recoveries which it might one day consider satisfactory. As dictated by history, we know the possibilities of ring recoveries shall remain low irrespectively.
- The derogation resorts to mass-trapping finches using clap-nets as the only solution. It considers that there is no satisfactory solution on the unsubstantiated word of the competent Minister. It also includes the possibility of satellite tagging and scientific ringing as suitable research methods, yet evidently does not intend to explore these in 2020.
- The derogation employs trappers to the task and not ornithologists, researchers, bird ringers or anyone competent in actually carrying out research work. A 6-question exam does little justice to retrain a trapper's traditional practice of capturing and keeping finches which Malta has always maintained as being the culmination of past derogations.
- No research derogation employs 3,000 or so 'research stations' across two Mediterranean islands along the Central Mediterranean flyway of European finches. This ultimately translates to a deliberate disturbance (and killing) of wild birds (protected species) along their migratory routes. This is not merely a mist net, but 3,000 clap nets which aided with pre-recorded bird calls and live decoys shall undoubtedly land and net finches throughout the whole day, every day for two whole months during these finches' autumn migration. In the vast majority of cases, finches will be clap-netted just for recreational purposes with absolutely no scientific data whatsoever extracted from such birds which run the risk of being kept in captivity.
- The scene has deliberately been set by WBRU: from its notifications to trappers prior to legislation coming out, to the definitions and conditions enshrined in the framework regulations themselves; to pave the way for the deliberate capture and keeping (trapping) of thousands of finches at the authorised research/trapping stations without the need to report anything except the odd chance a ring recovery might come up, and with ample time to prepare ways and means of evading detection.

Considering the upcoming season as an Article 9(1)b derogation simply because Maltese authorities found it fit to disguise a trapping derogation and use such terminology to define the upcoming trapping season does injustice to all the research work undertaken in good faith across the EU. We therefore maintain this is none other than a trapping derogation which should be viewed in contrast with the European Court of Justice ruling Case C-557/15, dated 21<sup>st</sup> June 2018.

## 4.0 BOTH DEROGATIONS ARE ESSENTIALLY A MULTI-SPECIES OPEN TRAPPING SEASON

### 4.1 Trapping derogation for Song Thrush and Golden Plover (20th October – 10th January)

As introduced in Chapter 1.0, the finch derogation is being applied during the same period of a derogation allowing the trapping of Song Thrush and Golden Plover. Legal Notice 376 of 2020 has opened a trapping season for both Golden Plover and Song Thrush with the following conditions, under the umbrella of the framework regulations originally enacted in 2012 and amended over the years<sup>7</sup>. In essence the conditions of the permitted season opened this 20th October are as follows:

- Song Thrush to be trapped between the 20th October and 31st December with a seasonal quota set at 5,000 birds
- Golden Plover to be trapped between the 1st November and the 10th January with a seasonal quota set at 700 birds
- Trapping to be carried out in the stipulated period any day from two hours before sunrise to two hours after sunset
- Trapping sites to be authorised by WBRU and to have:
  - Not more than two pairs of clap nets per site
  - With each net not exceeding 60 square metres when targeting Golden Plover
  - And not exceeding 38 square metres when targeting Song Thrush
  - Utilise nets with mesh sizes not less than 35mm by 35mm for Song Thrush
  - Utilise nets with mesh sizes not less than 45mm by 45mm for Golden Plover
  - In the case of targeting both species, Song Thrush limitations of 35mm by 35mm and 38 square metre limits apply
  - A limit of 10 live decoys applies per trapping site, as long as such live-decoys bear a ring issued by WBRU
- Trappers are obliged to report their catches as soon as possible via SMS
- Trappers may not use pre-recorded bird calls
- Nets shall either be removed or the clap-net pair(s) deactivated and the nets completely covered when not in use.
- Season to be policed by around 40 officers during open season hours, and 3 officers per 1000 licences outside season hours
- Coordinates of authorised clap-net pairs to be published by the Wild Birds Regulation Unit at least 3 days before the start of the research period and shall be available on-line at all times during the research period

The conditions of application of such a derogation are claimed to be in the spirit of Article 9(1)c of the Birds Directive namely that:

*Malta may derogate from the provisions of Articles 5 to 8 of the Directive, where there is no other satisfactory solution to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers*

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<sup>7</sup> <https://legislation.mt/eli/sl/549.74/eng/pdf>

Our arguments that the conditions of Article 9(1)c are not being fulfilled with these derogations has been made multiple times with DG ENV through our reports submitted in July 2015, May 2018 and more recently November 2019 (BirdLife Malta 2015, 2018, 2019).

The issues concern the fact:

- A. That a satisfactory alternative to trapping such birds to be used as live-decoys exists in the form of (i) birds already held captive, and (ii) fake decoys;
- B. That such an open trapping season keeps year after year being used as a cover for continued illegal finch trapping;
- C. That there is no real control over the number of birds being caught – rather the only form of control that can be exerted is that through limiting effort (season’s length, number of licenses, number of trapping sites, number of nets, etc)
- D. In relation to above therefore it is beyond any comprehension how WBRU managed to extend the overall trapping season by 10 days (until 10 January) in recent years
- E. That the use of pre-recorded bird calls on especially Golden Plover is a matter beyond the possible control of enforcement authorities – Malta’s countryside becomes a loud cacophony of Golden Plover calls, day and night, during their peak migration period;
- F. That clap nets are not a selective means of capture (especially when combined with the possibility of using smaller mesh size such as 35mm by 35mm permissible by law). To make matters worse, the 2019 derogation decreased the mesh size from 45mm to 35mm for Song Thrush – and despite our studies pointing to this not being needed, the derogation has been nonetheless accepted. It is also permissible for trappers targeting both species to accordingly simple make use of 35mm by 35mm nets.
- G. That measures in the law introduced with the aim of reducing bycatch (i.e. deactivation/covering nets when not in use) have never been really enforced.

It is understood that the European Commission has maintained open the infringement proceedings with respect to this derogation which has already been subject to a Letter of Formal Notice in June 2011 and a Reasoned Opinion in February 2012 (European Commission, 2012). BirdLife Malta is not aware of what kind of informal warnings were formalised by the DG ENV in subsequent years.

#### ***4.2 Both derogations are being applied at the same time, location and by the same operators***

As confirmed by the Ornis Secretary and Head of the WBRU during the Ornis Committee meeting of the 24<sup>th</sup> August 2020, trappers were given the option of applying for both derogations for finches and song thrush/golden plover at the same time. Point 5.7 is reproduced hereunder ad verbatim:

*“Regarding the use of clap-nets, the Secretary stated that at application stage, licensed live-catchers have the option of submitting two separate application forms, one for the Golden Plover and Song Thrush live-capturing special licence under the terms of [SL 549.74](#), and the other form for the finches research special licence, under the terms of the proposed framework regulations. In both instances, the applicant is required to submit a site plan with each application form showing the location of the registered clap-net pair(s) outlined in red. For the Golden Plover and Song Thrush special licence, the maximum limit is two registered clap-net pairs from one hide and for finches’ special licence only one registered clap-net pair from one hide. The Secretary further explained that as specified in the proposed new framework regulations, if an individual applies for both special licences, he can either:*

- *submit **two copies of the same site plan**, one for live-capturing of Golden Plovers/Song Thrushes and the other copy for finches research, but for the finches special licence he has to*

*outline the boundary of only one of the two clap-net pairs **and the latter can be used for the capture of all species allowed under the terms of both special licences; or***

- *submit two site plans, one for each application, showing a maximum of two clap-net pairs from one hide for live-capturing of Golden Plovers/Song Thrushes and a separate clap-net pair for the finches research project.”*

The current season therefore offers the possibility for trapping licence holders to engage in both derogations, with the possibility of using clap nets to target all species (Song Thrush, Golden Plover, Linnet, Chaffinch, Goldfinch, Hawfinch, Serin, Siskin & Greenfinch) and using nets with mesh sizes of either 45mm X 45mm, 35mm X 35mm or 18mm X 18mm. One licence holder is accordingly permitted to have up to a total of three clap nets – two for the Song Thrush/Golden Plover derogation, and one for finches.

This will make the strict supervision and control more difficult since trappers in such circumstances where they apply for trapping all species could use smaller mesh size than it is supposed to without the authorities being able to enforce the law on them.

#### **4.3 The conditions of both derogations are unenforceable**

Given the possibility of both derogations being applied at the same time, at the same location and by the same licence holder, our attempts to understand the complexity of this situation have so far not been answered.

Questions sent to WBRU on the 15<sup>th</sup> October 2020 (Annex I) regarding the distribution of trapping licences have remained unanswered at the time of writing. Similarly, the number of trapping sites that will be dedicated for finches and allowed to utilise a 18mm X 18mm clap net is currently unknown. The only information which has been published on the 19<sup>th</sup> October on WBRU’s website are the locations of trapping sites authorised for trapping Song Thrush/Golden Plover as are available on this link<sup>8</sup>. It appears that a total of 1,383 trapping sites have been authorised for the Song Thrush/Golden Plover derogation, the vast majority of which shall be targeting the trapping of both species. This could equate to up to 2,766 clap nets being authorised to operate, the majority of which (given they can target both species) might be utilising the smaller mesh size of 35X35mm, even when targeting Golden Plover, as long as the size of such size of the clap net is limited to 38 square metres.

Similar questions sent to the Environment Protection Unit to ascertain that police officers in the field enforcing this derogation have an idea which trapping sites are permitted for which, have also resulted in the negative (Annex J), with WBRU seemingly not publicising the finch locations, and possibly also not providing this information in time for the opening of both derogatory periods.

By publishing the locations of Golden Plover/Song Thrush trapping sites on the 19<sup>th</sup> October 2020, and by not publishing the locations of the finch ‘research’ sites, WBRU itself has already breached Regulation 8(7) of the Golden Plover/Song Thrush framework regulations and Regulation 8(9) of the Finch framework regulations which both mandated the WBRU to publish these online, 3 days before the derogation was applied.

The shortcomings in the administration of WBRU of these derogations are remarkable to say the least. Indeed, representatives of the Environment Protection Unit within the Maltese Police Force had mentioned to BirdLife Malta staff that tablets provided in past years by WBRU to help police locate and distinguish permitted trapping sites from others have been malfunctioning, non-responsive and at times not available during past derogations. It is unknown whether such tablets or any other means shall be provided to police to enable them

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<sup>8</sup> <https://mgoz.gov.mt/en/Documents/WBRU/autumn%20live%20capture/2020/gpstTraSitCoor2020.pdf>

to distinguish which trapping site is for what, and likewise to regulate or enforce the conditions of research and trapping and the literal very fine line between both practices, when officers shall be doing their spot-checks.

In essence this task has been rendered very difficult by the manner in which both derogations have been legislated. In Table 1 on the next page, we have attempted to portray the different combinations and conditions that may be permitted at respective trapping sites for which the two derogations shall apply.

A number of situations become very evident:

- A. Trapping sites might vary from a range of target species: from one where a single installation for a single species is permitted, to one where up to three clap-nets for multiple species may be permitted, to ultimately having a single same clap net which has the dual purposes of ‘researching’ finches and trapping Golden Plover and/or Song Thrush at the same time and with supposedly different restrictions.**
- B. Where pre-recorded bird calls were technically not permitted in past years on Golden Plover/Song Thrush trapping sites, a trapper shall be permitted to use pre-recorded bird calls a few metres away on his finch site or literally on the same site he is supposedly trapping for Song Thrush and Golden Plover. As we have portrayed in past years, the situation with electronic callers has already proven to be out of control. This move shall practically seal the deal with enforcement authorities not being able to penalise trappers for the presence of electronic devices on their trapping sites. Given that in this scenario the likelihood is that a trapper shall be operating a golden plover/song thrush clap net, and a finch clap-net from the same hide and location, it only takes a switch of a button from a remote device to switch the calls from finches to golden plover or song thrush (if not also other species), for the caller to exert its function of artificially luring also the birds that may be trapped.
- C. Where up to 2019 the smallest permissible mesh size for clap nets was 35mm X 35mm, this time round this shall be 18mm X 18mm even though decoys of thrushes and plovers might be permitted on site. Such conditions shall result in an indiscriminate catching of wild birds not only by increasing the catch effort on the target species (Golden Plover and Song Thrush), but practically opening the door for further bycatch of a variety of species which are somehow lured onto trapping sites. Adding the possibility that pre-recorded bird calls might very easily be switched to non-target species, the mesh size of 18mm is the only limit for catching a variety of locally breeding or migratory species from the thousands of permitted trapping sites operational during the season.
- D. Adding the situation with the use of single-use rings reported in section 3.4.4, if a trapper in possession of such rings, traps a wild finch, places a R16U ring on it, and keeps it at his trapping site, he is practically legal in the eyes of enforcement officers. Add to the fact that no limits are imposed in the law on the number of live finch decoys that may be utilised or found at a given trapping site – and the scene is practically set for the trapping (capture and keeping) of thousands of finches that shall be going on undetected over the coming days and months. A police officer finding finches fitted with R16U rings on a trapping site, shall be unable to press charges or prosecute the licence holder on the suspicion that the person has been trapping finches. A trapper has no obligation to report any clap-netted finches, or for the matter need to advise or have any limit of how many live decoys may be withheld on a trapping site.

*As has been presented and portrayed in this section it is evident that both derogations shall be resulting in the deliberate and indiscriminate capture and keeping of wild birds, in particular finches. The manner in which the respective legislation has been published, and the manner by which these have been (ill-*

*Administered by WBRU and the Ministry for Gozo, has resulted in a current situation where the location of 'research sites' for finches are unknown publicly and to enforcement authorities, where their distinction from trapping sites to research sites is practically non-existent, and where therefore a free for all situation shall prevail. This is the reason why we insist with DG ENV to not view the proposed finch derogation as an Article 9(1)b derogation.*

Table 1: Combinations of clap net installations permissible during the 2020 trapping seasons. A maximum of 5 combinations shall be allowed.

Target	Permitted clap net size	Permitted mesh size	Live-decoys	Fake decoys	Pre-recorded bird calls	Catching limitations	Reporting obligations
Golden Plover (only)	60 square metres	45mm X 45mm	10 birds fitted with WBRU rings	Unlimited	Not permitted	No limit until national quota of 700 birds is reached	All birds to be reported by SMS to WBRU in 'real-time'
Song Thrush (only)	38 square metres	35mm X 35mm	10 birds fitted with WBRU rings	Unlimited	Not permitted	No limit until national quota of 5,000 birds is reached	All birds to be reported by SMS to WBRU in 'real-time'
Song Thrush and Golden Plover	38 Square metres	35mm X 35mm	10 birds fitted with WBRU rings	Unlimited	Not permitted	No limit until respective quotas are reached (see above)	All birds to be reported by SMS to WBRU in 'real-time'
Finches	38 Square metres	18mm X 18mm	Unlimited number as long as these bear 16RU rings, mules & hybrids	Unlimited	Permitted	No limits	No birds may be reported. Only condition is to report ring recoveries at a future date in January to be established by WBRU
Finches/Song Thrush/Golden Plover	38 square meters	18mm X 18mm	10 Song Thrush or Golden Plover + unlimited number of finches bearing 16RU rings, mules and hybrids	Unlimited	Permitted	No limits for finches. Only limit for Song Thrush and Golden Plover when respective quotas are declared reached	Golden Plover and Song Thrush by SMS. Trapped finches have no reporting obligation unless they carry a scientific ring, in which case a formula may be sent sometime in January



## 5.0 BOTH DEROGATIONS IN CONTRAST TO BIRDS DIRECTIVE & ECJ RULING

Having delved into the shortcomings and scenarios of both derogations that have been permitted as of the 20<sup>th</sup> October, we would like to once again appeal to DG ENV to not view such derogations as an application of Article 9(1)b but to one where collectively and practically this is a trapping season for the seven finch species, Golden Plover and Song Thrush and with a tangible possibility of other species as by-catch. If we had to contrast a summary of our arguments presented in the previous sections to the application of an Article 9(1) c derogation (ultimately birds shall be caught and kept captive with no means of enforcing this) and to the shortcomings highlighted by the ECJ ruling of June 2018, it is very evident that there is room for ECJ referral and for calling for an immediate suspension of both trapping seasons.

An application of a derogation from Article 9(1) c would equate to the following statement:

*Malta may derogate from the provisions of Articles 5 to 8 of the Directive, where there is no other satisfactory solution to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers*

As we present in Table below, a confrontation of the various conditions required of the correct application of derogations to the Birds Directive, and in confrontation of the ECJ ruling of 2018, highlights clearly the evident breaches which should be intervened upon immediately.

PROVISIONS OF BIRDS DIRECTIVE/DEROGATION CONDITIONS	2020 SONG THRUSH/GOLDEN PLOVER DEROGATION	2020 FINCH 'RESEARCH' DEROGATION	ECJ RULING
Article 5(a) – deliberate capture or killing by any method	The permitted use of pre-recorded bird calls shall exacerbate this aspect of the derogation	As we have demonstrated the derogation is allowing for such a possibility – there are no limits on the number of finches to be caught, and the systems are in place to counterfeit freshly caught wild finches as permissible live-decoys for which there are no imposed limits	Court declared that by adopting a regime to trap finches Malta had failed to fulfil its obligations under Article 5(a). In providing for trappers to utilise both derogations with no properly functioning systems of control in place, both derogations shall guarantee the deliberate capture of wild birds, thus breaching the ECJ ruling.
Article 5 (d) - deliberate disturbance of these birds ...in so far as disturbance would be significant having regard to the objectives of this Directive;	The derogation is supposedly an exemption to this	A research derogation would require this exemption – however the season shall permit thousands of clap nets to be operative for finches throughout the Maltese Islands for two whole months – if indeed finches are caught and released, the number of trapping sites is high enough to guarantee them being recaptured over and over again	
Article 5 (e) - keeping birds of species the hunting and capture of which is prohibited.	Not applicable	The derogation conditions as permitted shall allow the possibility of protected finches to be kept in captivity	Court declared that by adopting a regime to trap finches Malta had failed to fulfil its obligations under Article 5(e). As we have demonstrated the derogations in place shall allow the capture and keeping of protected finch species, with ample means of evading detection and control. Accordingly, these derogations are also breaching the ECJ ruling on this front.
Article 8 (1) - ...Member States shall prohibit the use of all means, arrangements or methods	The permitted use of pre-recorded bird calls shall exacerbate this aspect of the derogation.	The manner in which the derogation shall be applied shall permit the large-scale and non-selective capture of finches, some of which are known to have sporadic breeding behaviour in the Maltese Islands. The use of pre-	Court declared that by adopting a regime to trap finches Malta had failed to fulfil its obligations under Article 8(1). As we have demonstrated the derogations are being authorised allowing all trapping licence holders to

PROVISIONS OF BIRDS DIRECTIVE/DEROGATION CONDITIONS	2020 SONG THRUSH/GOLDEN PLOVER DEROGATION	2020 FINCH 'RESEARCH' DEROGATION	ECJ RULING
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).	The conditions where 18mmX18mm nets may be utilised for this purpose shall result in non-selective capture of wild birds.	recorded bird calls and the scale of clap-nets being permitted may cause local disappearances. 18mmX18mm mesh sized nets shall result in the non-selective capture and killing of birds.	utilise up to 3 clap-nets each, including those with a mesh size which can guarantee the catch of multiple species and therefore will be non-selective. Moreover, the use of pre-recorded bird calls shall augment the effectiveness of clap-netting wild birds, guaranteeing a large-scale capture of wild birds.
Article 9(1) - where there is no other satisfactory solution	Satisfactory alternatives exist in the form of captive-held population of both species, and in the use of fake decoys which will nonetheless permit the hunting of such species	Satisfactory alternatives exist in the form of 87 years of ring recovery data. There is no intention for Maltese authorities to consider such ring recovery data as a satisfactory solution, given that ultimate objective is to allow trappers to net finches. Declaration that Minister certifies there is no other alternative is not a sufficient justification.	Same arguments highlighted in ECJ ruling still apply. To data Malta has not explored or sufficiently proven that no other alternatives to the capture and keeping of wild finches occurs.
Article 9(1)b - for the purposes of research and teaching	Not applicable	Not applicable – the derogation is not aimed at the conservation of the species; mass trapping of finches is ultimate aim; satellite tagging and scientific ringing cannot and will not be employed; methodology is not devised or practiced by ornithologists, research, bird ringers or anyone competent in the matter; trappers are not researchers; no scientific data shall be extracted from great majority of finches that will be captured;	Not applicable
Article 9(1) c – permit under strictly supervised conditions	Conditions of derogation have been rendered non-supervisable – with the permitted use of smaller sized mesh size nets if in combination with other species; with the possibility of having pre-recorded bird callers on the same site; and with the removal of quotas in past years	Conditions of derogation are not supervisable – electronic callers may be used to lure finches which may be trapped and fitted with R16U rings to be counterfeited as live-decoys for which no limits are imposed; Situation with spot checks is also known – various sites will go unchecked and such sites will possibly result in the deliberate capture of finches to be kept in captivity; Enforcement authorities/public are not in possession of locations where finch capture shall be permitted	There shall be no stark difference to what the ECJ considered as insufficient cover during past trapping derogations. Rather the situation has regressed with illegal killing being a record high on Maltese Islands and police numbers and coverage being very weak in days preceding derogation.
Article 9(1)c – on a selective basis	That clap-nets are non-selective has been established in the court ruling. The conditions of both derogations where 18mm by 18mm mesh size nets in conjunction with callers may be permitted shall ensure the activity is even less selective than it has ever been.		
Article 9(1)c – judicious use	In the light of viable alternatives, the trapping of such birds for use of live decoys is arguably a form of judicious use	Should the derogation be one truly for research this could be considered a form of judicious use. The stated aim of this derogation is to apply a future trapping derogation – therefore the capture of such forms cannot be considered as judicious use`	Ruling made clear its arguments that the catching of finches to be kept in captivity for the sole fun of it is not a form of judicious use – especially in the light of available alternatives.
Article 9(1)c – small numbers	The prevalent enforcement scenario and the failed game reporting system managed by WBRU do not guarantee much control over the number of birds trapped – therefore there is no guarantee such a clause is being abided to	Small numbers are ultimately the excuse of the research derogation. However as demonstrated the netting of finches shall be non-selective and undetectable. It is safe to assume that a significant number of finches shall be trapped as a result of this derogation.	The derogations have no control over this aspect even though the law permits the trapping of 700 Golden Plover and 5,000 Song Thrush. Game reporting system is flawed, use of pre-recorded callers and small mesh-size nets shall increase catch efforts for all species being derogated for.

## 6.0 CONCLUSION

The 2020 derogation and season opened from the 20<sup>th</sup> October with the claimed objective of researching the source population of finches, does not stem from the need to answer a research question. Rather the derogation stems from the Maltese government's need to appease politically Malta's hunting and trapping lobby, after it had failed these when it ended up losing finch trapping at the European Court of Justice.

The legal advice sought by the Maltese government over the past years (included as Annex K) is clearly a very skewed interpretation of what possibilities the ECJ verdict leaves for a future trapping derogation, and rather than commending a way forward in line with the Birds Directive, has presented the small numbers clause as the only argument the Maltese authorities can latch open to permit some form of trapping, minimising the value of scientific data available to date, and not even delving on the need to demonstrate the absence of alternatives. While this is a possibly short-lived solution which will guarantee Prime Minister Abela honouring his promises in time for the Malta's next General Election (anticipated in 2021); this move comes in a regressive series of developments in recent months which are seeing Malta do away with proper enforcement concerning its obligations to conserve wild bird populations. Seeking justice on the local front is an arduous and almost impossible exercise. Challenging the remits of the Gozo Ministry versus that of the Environment Ministry on which ministry should be competent on bird protection regulations has already landed us in a never-ending saga, with only one hearing scheduled in 2020 which has been postponed. The situation with the administration of justice on bird hunting and trapping infringements is in a dire state as reported on local media (Times of Malta 2020a, 2020b).

Both derogations, applicable from the 20<sup>th</sup> October, are resulting in the indiscriminate and deliberate capture of thousands of birds for the keeping of captivity, including both huntable and protected species. Our arguments in this report show clearly and unequivocally that the derogation is not a research one. Although the framework regulations quote Article 9(1)b – the substance of the derogation, and how this is being currently practiced permit indirectly the deliberate capture of birds (breaching Articles 5 and 8 of the Birds Directive). Even if the capture and keeping of such birds might be viewed as a possible application of Article 9(1)c this goes against most of the shortcomings highlighted in the ECJ ruling.

Hence our request is one of immediate intervention by requesting the suspension of both trapping seasons, and referring the matter to the European Court of Justice CJ. With the golden plover/song thrush derogation at Reasoned Opinion stage, there are ample ways and means for the commission may take the next step in questioning the validity of these derogations.

Failure to do so shall have EU wide consequences across other Member states who are encountering conflicts between allowing trapping practices and conforming to the Birds Directive. Research work should be done in good faith and with a view of improving our knowledge on wild birds, what impacts them, and with a view of providing us with the knowledge to protect and conserve their future populations. Article 1 of the Birds Directive is clear on why such directives are in place. The directive..."relates to the conservation of all species of naturally occurring birds in the wild state in the European territory of the Member States to which the Treaty applies. It covers the protection, management and control of these species and lays down rules for their exploitation."

Let us not see twisted forms of research applied under the excuse of a derogation become the means by which the protection of these species are compromised, and as a way of finding suitable loopholes for the exploitation of such wild birds in return for political agendas and promises aimed at pro-longing destructive and unsustainable practices which should have been curtailed with Malta's accession to European Union, as anticipated in Malta's accession treaty. **ENDS**

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