



## Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

17 March 2021\*

(Reference for a preliminary ruling – Environment – Directive 2009/147/EC – Conservation of wild birds – Articles 5 and 8 – Prohibition of the use of any method of capture of birds – Article 9(1) – Authorisation to use, by way of derogation, a traditional method of capture of birds – Conditions – No other satisfactory solution – Preservation of that traditional method as the sole justification for the absence of an ‘other satisfactory solution’ – Selectivity of catches – National legislation authorising the capture of birds using limes)

In Case C-900/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Conseil d’État (Council of State, France), made by decision of 29 November 2019, received at the Court on 6 December 2019, in the proceedings

**One Voice,**

**Ligue pour la protection des oiseaux**

v

**Ministre de la Transition écologique et solidaire,**

intervenir:

**Fédération nationale des Chasseurs,**

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, L. Bay Larsen, C. Toader (Rapporteur), M. Safjan and N. Jääskinen, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

\* Language of the case: French.

after considering the observations submitted on behalf of:

- One Voice, by A. Moreau, avocate,
- the Fédération nationale des Chasseurs, by H. Farge and C. Waquet, avocates,
- the French Government, by A.L. Desjonquères and E. Leclerc, acting as Agents,
- the European Commission, by C. Hermes and F. Thiran, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 19 November 2020,

gives the following

### **Judgment**

- 1 This request for a preliminary ruling concerns the interpretation of Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ 2010 L 20, p. 7; ‘the Birds Directive’).
- 2 The request has been made in proceedings between, on the one hand, One Voice and the Ligue pour la protection des oiseaux (League for the Protection of Birds) and, on the other hand, the Ministre de la Transition écologique et solidaire (Minister for the Ecological and Inclusive Transition, France) concerning the validity of five decrees of 24 September 2018 relating to the use of limes to catch thrushes and blackbirds intended to be used as decoys during the 2018/19 hunting season in the departments of Alpes-de-Haute-Provence, Alpes-Maritimes, Bouches-du-Rhône, Vaucluse and Var (France) (JORF of 27 September 2018, texts Nos 10 to 13 and 15; ‘the decrees of 24 September 2018’).

### **Legal context**

#### ***European Union law***

- 3 According to Article 9(1) of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (OJ 1979 L 103, p. 1):  
  
‘Member States may derogate from the provisions of Articles 5, 6, 7 and 8, where there is no other satisfactory solution, for the following reasons:  
  
...  
  
(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.’
- 4 The Birds Directive codified and repealed Directive 79/409.

5 According to recitals 3 and 5 of the Birds Directive:

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

...

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

6 Article 1(1) of that directive is worded as follows:

‘This 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.’

7 Article 2 of that directive 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.’

8 Article 5 of the same 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;

...’

9 Article 7(1) and (3) of the Birds Directive provides:

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

...

3. The species referred to in Annex II, Part B may be hunted only in the Member States in respect of which they are indicated.’

10 Part B of Annex II to that directive mentions, inter alia, *turdus merula* (blackbird), *turdus pilaris* (fieldfare), *turdus philomelos* (song thrush), *turdus iliacus* (redwing) and *turdus viscivorus* (mistle thrush).

11 Article 8(1) of that directive provides:

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

12 Limes are among the means of capture referred to in point (a) of Annex IV to the Birds Directive.

13 Article 9(1) and (2) of the Birds Directive states:

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

...

(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations referred to in paragraph 1 must specify:

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

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

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

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

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

### ***French law***

14 Title II of Book IV of the Code de l’environnement (Environmental Code), relating to hunting, includes, inter alia, Chapter IV, entitled ‘Exercice de la chasse’ (Carrying on of hunting), itself subdivided into six sections, Section 3 being devoted to ‘modes et moyens de chasse’ (methods and means of hunting). Article L. 424-4 of that code, which is found in that section, provides:

‘In the period in which the hunting season is open, the licence confers upon the holder the right to hunt by day, with guns, with horns and dogs or with birds of prey, in accordance with the distinctions drawn by the decrees of the Minister responsible for hunting. The day starts one hour before sunrise in the capital of the department and ends one hour after sunset.

...

In order to permit the strictly controlled selective hunting of small quantities of migratory birds, the Minister responsible for hunting shall authorise, under the conditions which he defines, the use of traditional hunting methods and resources that derogate from those authorised under the first paragraph.

...

Limes shall be applied one hour before sunrise and removed before 11 a.m.

All other means of hunting, including aeroplane and motor vehicles, even as a means of flushing game, are prohibited.

...'

- 15 Article 1 of the arrêté du secrétaire d'État auprès du Premier ministre, chargé de l'environnement et de la prévention des risques technologiques et naturels majeurs, du 17 août 1989, relatif à l'emploi des gluaux pour la capture des grives et des merles destinés à servir d'appelants dans les départements des Alpes-de-Haute-Provence, des Alpes-Maritimes, des Bouches-du-Rhône, du Var et de Vaucluse (Decree of the State Secretary to the Prime Minister, responsible for the environment and the prevention of major technological and natural risks, of 17 August 1989 on the use of limes for the capture of thrushes and blackbirds intended to be used as decoys in the departments of Alpes-de-Haute-Provence, Alpes-Maritimes, Bouches-du-Rhône, Var and Vaucluse (JORF of 13 September 1989, p. 11560; 'the Decree of 17 August 1989')) provides:

'The use of limes to catch mistle thrushes, fieldfares, redwings, song thrushes and blackbirds intended to be used as decoys for personal use shall be authorised in the departments of Alpes-de-Haute-Provence, Alpes-Maritimes, Bouches-du-Rhône, Var and Vaucluse under the strictly controlled conditions defined below in order to permit the selective capture of those birds in small quantities, since there is no other satisfactory solution.'

- 16 Under the first paragraph of Article 4 of that decree:

'Limes may remain in place only when a hunter is present. Every bird taken shall be cleaned immediately.'

- 17 Article 6 of that decree states:

'The maximum number of birds that may be caught during the season and, where appropriate, the technical specifications for each individual department shall be determined each year by the Minister responsible for hunting.'

- 18 Article 11 of the same decree stipulates:

'Any game other than mistle thrushes, fieldfares, redwings, song thrushes and blackbirds caught accidentally shall be cleaned and released immediately.'

- 19 Pursuant to the Decree of 17 August 1989, the ministre d'État, ministre de la Transition écologique et solidaire (State Minister, Minister for the Ecological and Inclusive Transition), fixed, by the decrees of 24 September 2018, the maximum number of thrushes and blackbirds intended for use as decoys that may be caught using limes at 2 900 in the department of

Alpes-de-Haute-Provence, at 400 in the department of Alpes-Maritimes, at 11 400 in the department of Bouches-du-Rhône, at 15 600 in the department of Vaucluse and at 12 200 in the department of Var, respectively, for the 2018/19 hunting season.

### **The dispute in the main proceedings and the questions referred for a preliminary ruling**

- 20 One Voice brought five actions before the Conseil d'État (Council of State, France) seeking annulment of the decrees of 24 September 2018 and an order requiring the Minister for the Ecological and Inclusive Transition to repeal the Decree of 17 August 1989. The League for the Protection of Birds brought five actions before that court seeking annulment of the decrees of 24 September 2018. Those different actions were joined by the referring court.
- 21 In support of their actions, the applicants in the main proceedings submitted, in essence, in particular, that the Decree of 17 August 1989, pursuant to which the decrees of 24 September 2018 were adopted, infringes the provisions of Article 9(1) of the Birds Directive, notably in that it authorises the use of a non-selective traditional hunting method, namely the use of limes, without, the absence of another satisfactory solution having been justified. In addition, the League for the Protection of Birds submits that the decrees of 24 September 2018 also infringe that directive in that they authorise the taking of birds under conditions which are not strictly controlled and without it having been shown that the birds permitted to be taken are limited to small quantities.
- 22 The referring court notes, in the first place, that, in the judgment of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202), the Court held that the provisions of the Decree of 27 July 1982, from which those of the Decree of 17 August 1989 do not differ substantially, were compatible with the requirements of Directive 79/409 and, in particular, that they did not infringe the requirement of 'judicious use of certain birds in small numbers' in the light of the fact that the rules that they laid down were 'very precise'.
- 23 However, the referring court observes that, in the judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477), which was delivered after the entry into force of Article 3 TEU and Article 37 of the Charter of Fundamental Rights of the European Union ('the Charter'), the Court held that national legislation authorising another traditional hunting process did not fulfil one of the conditions laid down in Article 9(1)(c) of the Birds Directive in order to be able to derogate from Article 8 of that directive, namely the selective nature of the method of capture concerned, relying on the existence of 'by-catch' without specifying the size of that by-catch.
- 24 In that context, the referring court seeks to ascertain whether Article 9(1)(c) of the Birds Directive must be interpreted as precluding Member States from authorising the use of means, devices, methods of capture or killing capable of leading, even minimally and on a strictly temporary basis, to by-catch. If the answer is in the negative, it is appropriate to ascertain what criteria, relating in particular to the limited proportion or size of that by-catch, or to what is in principle the non-lethal nature of the authorised hunting process and to the obligation to release without serious harm the specimens captured accidentally, may be applied in order for the selectivity criteria laid down in that provision to be considered to be satisfied.
- 25 In the second place, the referring court notes that, although, in the judgment of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202), the Court also held that the use of limes for the capture of thrushes, a traditional method of hunting in certain French departments, did not

infringe the requirements of Directive 79/409, referred to in the Birds Directive, it nevertheless considered, in the judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477), that the provisions of Article 9 of the Birds Directive place the condition of a clear and sufficient statement of reasons for the absence of another satisfactory solution on the derogation granted by a Member State.

26 Since the Decree of 17 August 1989 states that, in the light of the fact that the method of hunting using limes in the departments concerned is a traditional method of hunting, ‘there is no other satisfactory solution’, the referring court therefore seeks to ascertain whether the Birds Directive must be interpreted as meaning that the objective of preserving the use of traditional methods and means of hunting birds, for recreational purposes, and in so far as all the other conditions placed on such a derogation by Article 9(1)(c) thereof are fulfilled, may in itself justify the absence of another satisfactory solution, within the meaning of Article 9(1) of that directive, thus permitting a derogation from the principle laid down in Article 8 thereof that those methods and means of hunting are prohibited.

27 In those circumstances, the Conseil d’État (Council of State) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Must Article 9(1)(c) of [the Birds Directive] be interpreted as precluding Member State from authorising the use of means, devices, methods of capture or killing capable of leading, even minimally and on a strictly temporary basis, to by-catch? Where appropriate, what criteria, relating in particular to the limited proportion or size of such by-catch, to what is in principle the non-lethal nature of the authorised hunting process and to the obligation to release without serious harm the specimens captured accidentally, may be applied in order for the selectivity criteria laid down in that provision to be considered to be satisfied?’

(2) Must [the Birds Directive] be interpreted as meaning that the objective of preserving the use of traditional methods and means of hunting birds, for recreational purposes, and in so far as all the other conditions placed on such a derogation by [Article 9(1)(c) thereof] are satisfied, may justify the absence of another satisfactory solution within the meaning of Article 9(1) [thereof], thus permitting a derogation from the principle laid down in Article 8 that those methods and means of hunting are prohibited?’

## **Consideration of the questions referred**

### ***The second question***

28 By its second question, which it is appropriate to examine first, the referring court asks, in essence, whether Article 9(1)(c) of the Birds Directive must be interpreted as meaning that the traditional nature of a method of capture of birds is sufficient, in itself, to establish that another satisfactory solution, within the meaning of that provision, cannot be substituted for that method.

29 First of all, 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 the Birds Directive only in a manner which complies with EU law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is consonant with the principle of legal certainty. Accordingly, the applicable national legislation must specify the criteria for the derogation clearly and precisely and require the

authorities responsible for their application to take them into account. In respect of exceptional arrangements, which must be interpreted strictly and impose on the authority taking the decision the burden of proving that those conditions exist for each derogation, the Member States are required to ensure that all action affecting the protected species is authorised only on the basis of decisions containing a clear and sufficient statement of reasons which refers to the reasons, conditions and requirements laid down in Article 9(1) and (2) of that directive (judgment of 21 June 2018, *Commission v Malta*, C-557/15, EU:C:2018:477, paragraph 47).

- 30 More specifically, the evidence that the conditions placed on the derogation from the system of protection of the Birds Directive are satisfied must be based on well-established scientific knowledge. Thus, the best relevant knowledge must be available to the authorities at the time they grant the authorisations (judgment of 23 April 2020, *Commission v Finland (Spring hunting of male common eiders)*, C-217/19, EU:C:2020:291, paragraph 70 and the case-law cited).
- 31 Furthermore, although the applicable national legislation concerning the conservation of wild birds must, when it intends to apply the derogation provided for in Article 9 of the Birds Directive, specify the criteria for derogation clearly and precisely and require the competent authority to determine that there is no other satisfactory solution within the meaning of that article, the statement of reasons given for the exercise of that derogation must show that the condition relating to the absence of another satisfactory solution is fulfilled (see, to that effect, judgment of 21 June 2018, *Commission v Malta*, C-557/15, EU:C:2018:477, paragraphs 48 and 50).
- 32 In those circumstances, it cannot be considered that national legislation making use of the derogation provided for in Article 9 of the Birds Directive fulfils the conditions relating to the obligation to state reasons, which are laid down in Article 9(2) of that directive where it merely states that there is no other satisfactory solution, that statement not being supported by a detailed statement of reasons based on the best relevant scientific knowledge and setting out the reasons which led the competent authority to conclude that all the conditions capable of permitting a derogation within the meaning of Article 9 of that directive, including the condition relating to the absence of another satisfactory solution, are fulfilled.
- 33 Next, it should be borne in mind that the Court has already held that the hunting of wild birds for recreational purposes under the conditions laid down by the Birds Directive may constitute ‘judicious use’ authorised by that directive (judgment of 23 April 2020, *Commission v Finland (Spring hunting of male common eiders)*, C-217/19, EU:C:2020:291, paragraph 65 and the case-law cited). Traditional methods of hunting may also fall within the concept of ‘judicious use’, since, as Article 2 of that directive mentions, Member States must take account, when taking the measures referred to in that article, of recreational requirements.
- 34 However, although Article 2 of the Birds Directive calls on Member States to implement it while taking account of ecological, scientific and cultural requirements and economic and recreational requirements, it is clear that the conservation of birds is the principal objective of that directive.
- 35 In that regard, the Court has repeatedly held that the preservation of traditional activities does not constitute an autonomous derogation from the system of protection established by the Birds Directive (see, to that effect, judgments of 8 July 1987, *Commission v Belgium*, 247/85, EU:C:1987:339, paragraph 8; of 28 February 1991, *Commission v Germany*, C-57/89, EU:C:1991:89, paragraph 22; and of 23 April 2020, *Commission v Finland (Spring hunting of male common eiders)*, C-217/19, EU:C:2020:291, paragraph 85).



- 36 Hunting methods often form part of local traditions or use, so that, if the aim of preserving them constituted a ground for an autonomous derogation, that would result in the authorisation of a large number of practices that are contrary to the requirements of Article 9 of the Birds Directive. Such an approach would run counter to the strict interpretation which must obtain in the case of that provision.
- 37 It must also be borne in mind that, where the competent authority is called upon to determine that there are no other satisfactory solutions, it must compare the various solutions that fulfil the conditions of the derogation laid down in Article 9(1)(c) of the Birds Directive in order to determine the solution that appeared to be the most satisfactory (see, to that effect, judgment of 23 April 2020, *Commission v Austria (Spring hunting of male Eurasian woodcock)*, C-161/19, not published, EU:C:2020:290, paragraphs 51 to 57 and the case-law cited).
- 38 In that regard, the Fédération nationale des Chasseurs (National Federation of Hunters) and the French Government contend that the breeding of the species at issue in the main proceedings cannot constitute a satisfactory solution, having regard to its cost and the legislation in force, which prohibits commercial trade in those species.
- 39 As the Advocate General noted in point 36 of her Opinion, it is appropriate to take into consideration Article 13 TFEU, pursuant to which, in formulating and implementing the European Union's policies, the European Union and the Member States are to pay full regard to the welfare requirements of animals. It follows that the satisfactory nature of the alternative solutions must be assessed in the light of the reasonable options and the best available techniques (see, by analogy, judgment of 9 March 2010, *ERG and Others*, C-379/08 and C-380/08, EU:C:2010:127, paragraph 62).
- 40 In that regard, the Court has already held that the breeding and reproduction of protected species in captivity may constitute another satisfactory solution if they prove to be possible (judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 18 and the case-law cited), and that the transport of birds which have been lawfully captured or kept also constitutes judicious use within the meaning of Directive 79/409 (judgment of 8 July 1987, *Commission v Belgium*, 247/85, EU:C:1987:339, paragraph 48). Similarly, the fact that the breeding and reproduction of the species concerned in captivity are not yet feasible on a large scale by reason of the national legislation is not in itself capable of calling into question the relevance of those other solutions (see, to that effect, judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 21).
- 41 It follows that, as the Advocate General noted, in essence, in points 30 and 38 of her Opinion, there appear to be other options that may fulfil the requirement laid down in Article 9(1) of the Birds Directive.
- 42 Moreover, although the capture of birds using limes is in itself part of the hunting activity, it is only a step preliminary to other methods of taking birds, since the birds thus caught are intended for use as decoys for the purpose of attracting other birds of the same species, which are then shot at with guns.

- 43 The mere fact that another method of capture requires a change and, consequently, a departure from certain characteristics of a tradition cannot suffice for the view to be taken that there is no ‘other satisfactory solution’ within the meaning of Article 9(1) of the Birds Directive (see, to that effect, judgment of 12 December 1996, *LRBPO and AVES*, C-10/96, EU:C:1996:504, paragraph 21).
- 44 In the light of the foregoing considerations, the answer to the second question is that Article 9(1) and (2) of the Birds Directive must be interpreted as meaning that the traditional nature of a method of capture of birds is not, in itself, sufficient to establish that another satisfactory solution, within the meaning of that provision, cannot be substituted for that method.

### ***The first question***

- 45 By its first question, the referring court asks, in essence, whether Article 9(1)(c) of the Birds Directive must be interpreted as precluding national legislation which authorises, by derogation from Article 8 of that directive, the use of a method of capture of birds leading to by-catch in small quantities and for a limited period.
- 46 It should be noted that that question involves the interpretation of the condition, laid down in Article 9(1)(c) of the Birds Directive, that the capture, keeping or judicious use of certain birds must be selective.
- 47 In that connection, the parties which submitted written observations have referred to the judgments of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202); of 9 December 2004, *Commission v Spain* (C-79/03, EU:C:2004:782); or of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477).
- 48 In that regard, it should be noted, first of all, that, in the first judgment, although the Court found that the national rules in force were ‘very precise’ and, in particular, that there were a ‘considerable number of restrictive conditions’ concerning the grant of authorisations to capture birds, it merely considered that the information provided by the European Commission did not support that institution’s claims that the legislation of the Member State concerned infringed the requirements of Directive 79/409 (see, to that effect, judgment of 27 April 1988, *Commission v France*, 252/85, EU:C:1988:202, paragraphs 29 and 30) without, however, specifically and expressly examining the content of the rules concerning the capture of birds in the light of the selectivity criterion. Therefore, that judgment cannot be understood as having expressly validated those rules in the light of that criterion.
- 49 Next, as regards the second judgment, the national legislation at issue in the case that gave rise to that judgment, which permitted a particular form of hunting using limed twigs, was less stringent than that at issue in the main proceedings, with the result that the solution adopted in that judgment cannot be applied to the present case.
- 50 Lastly, in the third judgment, the Member State in question had itself acknowledged the non-selective nature of the method of capture authorised by its legislation.
- 51 Bearing that in mind, it is apparent from the wording of Article 9(1)(c) of the Birds Directive that Member States may derogate from the prohibition, laid down in Article 8 of that directive, of the use of the methods of capture listed in point (a) of Annex IV thereto, provided, inter alia, that those methods permit the capture of certain birds ‘on a selective basis’.

- 52 It should be noted that Article 9(1)(c) of the Birds Directive does not specify how that condition is to be understood. Furthermore, an analysis of the different language versions of that provision does not provide, as the Advocate General noted in points 53 and 54 of her Opinion, any guidance as to how the concept of ‘selectivity’ is to be understood.
- 53 Since Article 9(1)(c) of the Birds Directive does not include any reference to national laws, it must be stated that the concept of ‘selectivity’ constitutes an autonomous concept of EU law that must be interpreted uniformly throughout the territory thereof (see, by analogy, judgment of 25 June 2020, *A and Others (Wind turbines at Aalter and Nevele)*, C-24/19, EU:C:2020:503, paragraph 75). Moreover, it is settled case-law that the interpretation of a provision of EU law requires account to be taken not only of its terms, but also of the context in which it is set and the objectives pursued by the act of which it forms part (judgment of 9 October 2019, *BGL BNP Paribas*, C-548/18, EU:C:2019:848, paragraph 25).
- 54 As regards, first of all, the word ‘selectivity’, it must be noted that it covers, in its usual meaning, anything which makes a selection, namely a process by which, within a given set of alternatives, certain alternatives are chosen or retained to the exclusion of others, on the basis of specified characteristics.
- 55 As regards, next, the context in which Article 9(1)(c) of the Birds Directive is set, it should be borne in mind that Article 5(a) of that directive lays down, without prejudice to Articles 7 and 9 thereof, a general prohibition of the deliberate killing or capture by any method of the bird species referred to in Article 1 of that directive. In that context, Article 8(1) of the Birds Directive provides that Member States are to 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)’, which include the use of limes.
- 56 It follows from those provisions, as the Advocate General noted in point 21 of her Opinion, that the Birds Directive prohibits, in principle, the use of the method of capture consisting in the use of limes.
- 57 Thus, the possibility to derogate provided for in Article 9(1)(c) of the Birds Directive is the counterpart of the prohibition of non-selective methods of capture, which is laid down in Article 8(1) of that directive, and in particular of those listed in point (a) of Annex IV thereto.
- 58 Lastly, as regards the objectives pursued by the Birds Directive, it should be noted, as is apparent from recitals 3 and 5 of that directive, that ‘the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary in order to attain the [Union]’s objectives regarding the improvement of living conditions and sustainable development’ and that the decline in a large number of those species represents ‘a serious threat to the conservation of the natural environment, particularly because of the biological balances threatened thereby’.
- 59 To address that threat, Article 1(1) of the Birds Directive states that that directive, which ‘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’, covers ‘the protection, management and control of these species and lays down rules for their exploitation’.

- 60 Furthermore, that directive comes within the framework provided for both in Article 3 TEU and in Article 37 of the Charter, provisions according to which, in essence, the European Union is to work for sustainable development and ensure a high level of protection of the environment.
- 61 In addition, it is apparent from the provisions of Article 9 of the Birds Directive, which refer to the strictly supervised conditions for the derogation set out therein and to the selective basis on which birds are captured, and, moreover, from the general principle of proportionality, that the derogation 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, paragraph 67 and the case-law cited).
- 62 Consequently, in the assessment of the selectivity of a method of capture, within the meaning of Article 9(1)(c) of the Birds Directive, it is appropriate to consider not only the details of that method and the size of the catch that it entails for the non-target birds, but also its possible consequences for the species captured in terms of harm caused, having regard to the objectives of protection pursued by that directive.
- 63 In that regard, a distinction should be drawn as to whether the method of capture is lethal or non-lethal. In the first case, a rather narrow interpretation of the condition of selectivity must be adopted, whereas, in the second case, that condition may be regarded as satisfied where there is by-catch, provided, however, that the species not targeted by that method are captured in small quantities for a defined period and that they can be released without sustaining harm other than negligible harm.
- 64 Accordingly, although the fact that a method of capture which is in principle non-lethal leads to by-catch is not, in itself, sufficient to establish the non-selective nature of that method, the size of that by-catch and the extent of any effects on the target and non-target species are indicative of the degree of selectivity of such a method.
- 65 It follows from the wording of Article 9(1)(c) of the Birds Directive, read in the light of Article 8(1) of that directive, from the objectives of that directive and from the framework within which it falls, a framework which is based on the provisions of Article 3 TEU, of Article 37 of the Charter, of the first subparagraph of Article 191(2) TFEU and of Article 13 TFEU on animal welfare, that the condition of selectivity laid down in Article 9(1)(c) of that directive must be understood as meaning that it can be satisfied, in the case of a non-lethal method of capture leading to by-catch, only if that by-catch is limited in size, that is to say, it concerns only a very small number of specimens captured accidentally, for a limited period, and only if those specimens can be released without sustaining harm other than negligible harm.
- 66 In the present case, the referring court notes that the method of capture at issue in the main proceedings is ‘in principle’ non-lethal and leads to by-catch only in small quantities and for a very limited period. In addition, Article 11 of the Decree of 17 August 1989 provides that any bird which is the subject of a by-catch ‘shall be cleaned and released immediately’.
- 67 However, as both the applicants in the main proceedings and the Commission have observed, and as the Advocate General noted in points 51 and 64 of her Opinion, it is highly likely, subject to the findings ultimately made by the referring court, that, despite being cleaned, the birds captured sustain irreparable harm, since limes are capable, by their very nature, of damaging the feathers of any bird captured.

- 68 In that regard, it must be borne in mind, first, that it follows from the case-law set out in paragraph 30 of the present judgment that the competent authorities must, at the time they grant the authorisations, have the best scientific knowledge available to them, which makes it possible to show that the conditions required for derogation from the system of protection established by the Birds Directive are satisfied.
- 69 Secondly, once the derogations have been granted, the competent authorities must, in accordance with Article 9(2)(e) of that directive, carry out the necessary controls in order to ensure that the by-catch is as close as possible to expected levels and sustains no harm other than negligible harm.
- 70 It follows that a non-lethal method of capture which leads to by-catch does not fulfil the selectivity requirement laid down in Article 9(1)(c) of the Birds Directive where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.
- 71 In the light of the foregoing considerations, the answer to the first question is that Article 9(1)(c) of the Birds Directive must be interpreted as precluding national legislation which authorises, by derogation from Article 8 of that directive, a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.

### Costs

- 72 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

- 1. Article 9(1) and (2) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds must be interpreted as meaning that the fact that the traditional nature of a method of capture of birds is not, in itself, sufficient to establish that another satisfactory solution, within the meaning of that provision, cannot be substituted for that method.**
- 2. Article 9(1)(c) of Directive 2009/147 must be interpreted as precluding national legislation which authorises, by derogation from Article 8 of that directive, a method of capture leading to by-catch where that by-catch, even in small quantities and for a limited period, is likely to cause harm other than negligible harm to the non-target species captured.**

[Signatures]