Summary of applicable legal considerations

Proposal to apply Autumn derogation for the live-capturing and keeping in captivity of seven finch species – Chaffinch (*Fringilla coelebs*), Linnet (*Carduelis cannabina*), Goldfinch (*Carduelis carduelis*), Greenfinch (*Carduelis chloris*), Hawfinch (*Coccothraustes coccothraustes*), Serin (*Serinus serinus*) and Siskin (*Carduelis spinus*).

**Background**

A comprehensive legal analysis was conducted by the Wild Birds Regulation Unit following Malta Ornis Committee’s request on 20\(^{th}\) August 2013 to assess Federation for Hunting and Conservation — Malta (FKNK)’s proposal concerning the application of a derogation under Article 9 of the EC Birds Directive to permit limited live capturing of seven species of finches under strictly supervised regime. The assessment incorporates legal advice from Attorney General’s Office, EU Secretariat, Permanent Representation of Malta to the EU as well as further independent legal advice. The analysis presented below also reflects outcome of preliminary discussion held with the legal services of the European Commission on 11\(^{th}\) March 2014. Below is a summary of key salient points emerging from this assessment.

**Legal Context**

The legal context within which derogation proposed by the FKNK is principally considered is defined by Malta’s obligations under the Act of Accession to the European Union, and Malta’s obligations under EC Birds Directive.

**Obligations under the Act of Accession to the EU**

Upon Malta’s accession to the European Union, the following derogation was inserted into the act of accession for Malta (hereinafter referred to as “the Accession Derogation”). The Accession Derogation provides as follows:

"By way of derogation from Articles 5(a), 5(e), 8(1) and Annex IV(a) of Directive 79/409/EEC, *Carduelis cannabina*, *Carduelis serinus*, *Carduelis chloris*, *Carduelis carduelis*, *Carduelis spinus*, *Fringilla coelebs* and *Coccothraustes coccothraustes* may be deliberately captured until 31 December 2008 by traditional nets known as clap-nets within the Maltese islands exclusively for the purpose of keeping them in captivity in accordance with the following intermediate targets:

– By the date of accession at the latest, the Maltese Ornis Committee will have been established, all trapping sites will have been registered, a pilot study for a captive breeding project and a study on mortality of finches in captivity will have been presented, the number and types of species held and bred in aviaries will have been assessed, as well as an information programme for implementation of a captive breeding system will have been presented to the Commission;

– By 30 June 2005 a captive breeding programme will have been introduced;"
By 31 December 2006 the success of the captive breeding system as well as the mortality rate of birds within the established captive breeding system will have been assessed;

By June 2007 the number of captured wild birds required to sustain genetic diversity will have been assessed;

By 31 December 2007, the Malta Ornis Committee will have established the number of wild specimens per species that may be captured in line with the Directive to ensure sufficient genetic diversity of the captive species.

The measures taken during the transitional measure shall be in full accordance with the principles governing the timing of hunting of migratory bird species as outlined in Directive 79/409/EEC. The number of captured birds is expected to be significantly reduced during the transitional measure. Malta will report annually to the Commission on the application of this transitional measure and on progress achieved.”

In this respect it should be noted that all the main requirements of the Act of Accession have been fulfilled, as summarised below:

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<th>Intermediary measure</th>
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<td>By the date of accession at the latest, the Maltese Ornis Committee will have been established, all trapping sites will have been registered, a pilot study for a captive breeding project and a study on mortality of finches in captivity will have been presented, the number and types of species held and bred in aviaries will have been assessed, as well as an information programme for implementation of a captive breeding system will have been presented to the Commission;</td>
<td>The Malta Ornis Committee was established in 2003 by Legal Notice 41 of 2003. Registration of trapping sites was carried out through an administrative requirement for trappers to register up to two trapping sites per license holder with the police. A pilot study was conducted in 2004 to assess mortality, the number and types of species held and bred in aviaries1.</td>
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<td>By 30 June 2005 a captive breeding programme will have been introduced;</td>
<td>A pilot captive breeding programme was initiated in February 2005, with the pilot programme being fully established by February 20062.</td>
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<td>By 31 December 2006 the success of the captive breeding system as well as the mortality rate of birds within the established captive breeding system will have been assessed;</td>
<td>An assessment was carried out by a sub-committee of the Malta Ornis Committee in February 2010. Detailed longitudinal statistics of the breeding project have been presented in successive annual reports to the Ornis Committee.</td>
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<td>By June 2007 the number of captured wild birds required to sustain genetic diversity will have been assessed;</td>
<td>The assessment of the performance of the programme was conducted in April 2007, and subsequently by a sub-committee of the Malta Ornis Committee in 2010, the latter report concluding that the taking of wild birds is not necessary for sustaining genetic diversity of the programme.</td>
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<tr>
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1 Survey report titled “Finches 2004: Number of trappers, number trapped, number bred, survival and mortality
2 Report on the progress obtained in the captive breeding programme run at the Għammieri Experimental Farm Complex, Luqa Malta, April 2007
It is evident that the Act of Accession dealt with derogations to allow finch live-capturing and keeping during the transitional period (2004 – 2008) and not after the transitional period. The Accession Treaty does not contain any reference to the possibility that Malta cannot continue to apply a derogation for the live capturing of finches, in accordance with the strict conditions stipulated in Article 9 of the Birds Directive, after the expiry of the transitional period in 2008. The transitional agreement therefore cannot preclude Malta from applying derogation in terms of Article 9 of the Birds Directive. The transitional agreement does not explicitly provide that Malta would be forfeiting its rights to apply Article 9 derogation for the live capturing of finches in the future, subject to meeting the relevant established parameters.

Article 2 of the Act of Accession provides: “From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act.” Article 10 provides: “The application of the original Treaties and acts adopted by the institutions shall, as a transitional measure, be subject to the derogations provided for in this Act.” This is furthermore confirmed by established case-law, which has repeatedly emphasized with regard to the 2003 Act of Accession (‘AA’) that “the provisions of Community law apply ab initio and in toto to new Member States, derogations being allowed only in so far as they are expressly provided for by transitional provisions…” (Case C-233/97 KappAhl [1998] ECR I-8069, paragraph 15, and the case-law cited).

In view of such clear pronouncements by the Court regarding the purely temporary and non-permanent effects of transitional measures, there appears to be no legal basis behind any potential claims that Malta may never consider a derogation under Article 9 (i.e. that it effectively relinquished its rights to apply an Article 9 derogation in the future).

The CJEU also established the principle that in interpreting a derogation emanating from the Treaty of Accession, such interpretation must be restrictive and in such a way as to achieve the objectives of the Treaty (Case C-233/97 KappAhl [1998]). It therefore cannot be argued that the Derogation is additional, parallel or somehow affects the elements and requirements established by the Art. 9 derogation. The effect of the Treaty of Accession Derogation is a temporal derogation and therefore all its effects and conditions expired on 31st December 2008.

Following the expiry of the period of derogation under the Accession Treaty, in the absence of any other law or regulation that regulates the issue, the only possible legal basis that could regulate the matter is Article 9 of the Birds Directive. That is, the intention of the Accession Treaty was to provide Malta with a derogation under the Birds Directive thus obviating the need to apply a derogation under Article 9 of the Birds Directive which could have otherwise been allowed (i.e. the Accession Treaty effectively served as a derogation from the provisions of the Birds Directive in replacement of the derogation under Article 9). However, the Accession Treaty was limited in time and following the period covered by the Accession Treaty, there is nothing that regulates the possibility to apply a derogation or otherwise under the Birds Directive. In the absence of any other specific rules, Article 9 of the Birds Directive remains the only possible legal basis to cover this legal vacuum.

Any argument to the contrary would mean that by means of the Accession Treaty, Malta relinquished its rights to apply Article 9 derogation in the future (even though this is not explicitly stated in the Accession Treaty). This cannot be inferred from the Accession Treaty, it did not seem to be the underlying intention of the Maltese Government at the time of the negotiations, and neither can it be legally envisaged or justifiable. There is therefore nothing stated in the law that prevents Malta from applying an Article 9 derogation provided the conditions for application of Article 9 are met.
Furthermore, application of Article 9 cannot be limited only to those numbers needed to ensure the refreshment of the genetic pool post-2008 as this assumes that the captive breeding programme is deemed to be another satisfactory solution even after the period of derogation. The Act of Accession did not assume that a captive breeding programme would at all costs prove successful in Malta; such an eventuality cannot possibly be established \textit{a priori} but only on the basis of empirical data acquired during the running of the programme itself. Therefore there is a lacuna in the AA vis-à-vis the eventuality that the captive breeding programme may not in fact prove successful. In such a case – and in line with the established case-law – it must be assumed that Article 9 of the Birds Directive, as an intrinsic part of the \textit{acquis}, would naturally apply.

In this regard it must be noted that the case-law does not preclude the possibility that the particular context in which an Accession derogation was negotiated may subsequently change, thus necessitating the adoption of new legislative provisions to cater for such a situation (Parliament v Council [2006]). Such reasoning \textit{multo magis} applies in a situation such as the present one, where the ‘intermediate target’ consisting in the establishment and running of a captive breeding programme – which is inherently experimental and cannot \textit{a priori} be foreseen or even assumed to be successful in any given national context – proved unsuccessful for various practical reasons; and where accordingly the full application of the Birds Directive, including Article 9 thereof, must be held to apply. According to such reasoning, it cannot possibly be argued that the transitional derogation provided in the Act of Accession until December 2008 somehow precluded the possibility for Malta to apply Article 9 of the Birds Directive following this date outside of the captive breeding programme.

\textbf{Conditions for the Application of Derogation}

Article 9 of the Birds Directive allows Member States to derogate from the provisions of Articles 5, 6, 7 and 8, 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. Article 9 of the EC Birds Directive states:

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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:

(a) - in the interests of public health and safety,
- in the interests of air safety,
- to prevent serious damage to crops, livestock, forests, fisheries and water,
- for the protection of flora and fauna;
(b) for the purposes of research and teaching, of re-population, of re-introduction and for the breeding necessary for these purposes;
(c) to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers.

2. The derogations must specify:
- the species which are subject to the derogations,
- the means, arrangements or methods authorized for capture or killing,
- the conditions of risk and the circumstances of time and place under which such derogations may be granted,
- 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,
- the controls which will be carried out.
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3. Each year the member states shall send a report to the Commission on the implementation of this Article.

4. On the basis of the information available to it, and in particular the information communicated to it pursuant to paragraph 3, the Commission shall at all times ensure that the consequences of these derogations are not incompatible with this Directive. It shall take appropriate steps to this end.”

No other satisfactory solution

The proposal for the application of derogation on the basis of Article 9 of the Birds Directive would need to satisfy the condition that the derogation is being applied because there exists no other satisfactory solution to replace this activity.

An analysis of whether there is "no other satisfactory solution" can be considered as having three parts:

i. What is the problem or specific situation that needs to be addressed?

ii. Are there other solutions?

iii. If so, will these resolve the problem or specific situation for which the derogation is sought?

It must be noted that according to established case law of the CJEU, the very fact that captive breeding is successful by some enthusiasts (even if not many) implies that captive breeding may be considered as a satisfactory solution. Thus, for example, in *Ligue Royale Belge pour la Protection des Oiseaux C-10/96*, the Court held that the fact that the breeding and reproduction of birds in captivity is successfully carried on by some breeders (even if not by all, or the majority), implies that the satisfactory solution does indeed exist.

However, in Malta’s case the captive breeding programme cannot, in essence be considered as a satisfactory alternative solution given that it does not take account of the socio and cultural context of this activity. Indeed, the practice of live finch capturing by clap nets is a tradition of considerable socio-cultural value that is deeply rooted within Malta’s history and culture, and has been practiced for hundreds of years. The ban on finch trapping introduced in 2009 has been consistently criticised by a significant proportion of the population. It is perceived as a very harsh measure which completely overlooks the recreational aspect of this activity and undermines the cultural context of finch trapping in Malta. The measures contained in the Act of Accession do not, in principle, address the problem at hand and fail to provide a satisfactory solution. Taking into account the historical and socio-cultural context of wild finch capturing in Malta, captive breeding cannot be considered an alternative to capturing since the two are fundamentally different practices altogether. This can be clearly illustrated by the “fishermen v. aquarium keepers’ paradigm”. That is to say, the passion to live-capture the seven finch species in question derives from the interplay of a series of complex elements which together make up the activity. Thus, any alternative satisfactory solution to the activity of live finch capturing must encompass all of the following elements:

(i) The preparation of relative equipment;

(ii) The preparation of the trapping site;

(iii) The daily finch-husbandry of the live-decoys;

(iv) The days spent in the open air in natural surroundings;

(v) The passionate anticipation of the occasional catch; and

(vi) The subsequent keeping of the songbird.
Applying derogation for live finch capturing in order to sustain the genetic pool of a captive breeding programme cannot be considered an alternative satisfactory solution given that the captive-breeding programme in itself does not constitute an alternative satisfactory solution for live-finch trappers, just as a fisherman’s passion can never be satisfied through the purchase of farmed fish. It is important to underline that the cultural value linked to the entire activity cannot be replaced by captive breeding or by any other activity taking account of the very specific circumstances of Malta’s situation.

The “cultural” and “recreational” requirements are also specifically referred to in Article 2 of the Birds Directive, which states that 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”.

Moreover, the Court of Justice of the European Union has also acknowledged that the other satisfactory solution criterion must also be seen in the very specific circumstances of the case and what may be a satisfactory solution in one Member State is not necessarily a satisfactory solution in another Member State. See for example, Commission v Malta Case C-76/08, which although it referred to hunting in spring as opposed to the distinct activity of trapping, it also entered into a general consideration of what would normally be deemed to constitute a satisfactory solution. In this context, the Court was required to assess the specific circumstances of a particular case which would lend insight into whether or not an activity is deemed to constitute an alternative satisfactory solution (paragraph 63):

“Having regard to those very specific circumstances, hunting for quails and turtle doves during the autumn hunting season cannot be regarded as constituting, in Malta, another satisfactory solution, so that the condition that there be no other satisfactory solution, laid down in Article 9(1) of the Directive, should, in principle, be considered met.”

In line with the best practices described in the Guide to Sustainable Hunting under the Birds Directive, a number of possible alternatives, including a captive breeding programme, scientific ringing schemes, a ban on trapping, and alternative derogations involving live-capturing of other species, have been subjected to a test, which resulted in a clear conclusion that, in the Maltese context, there is only one solution to the problem that can be deemed to be satisfactory. The solution consists of permitting, under strictly supervised conditions and on a selective basis, the capture, keeping and other judicious use of seven finch species in autumn, in small numbers, subject to meeting all parameters of Article 9 of the Birds Directive. This solution is the only solution that satisfactorily addresses the problem at hand, since in the Maltese context, no other approach can provide a replacement activity with similar or comparable socio-cultural value and significance.

Moreover, due to reasons related to Malta’s unique biogeographical circumstances, and the inherent difficulty of captive-breeding finches taken from the wild in Malta, captive breeding programme cannot provide satisfactory solution.

Malta has attempted, in good faith, to establish a pilot captive breeding programme, which programme was set up in 2006 and continued to function till the present day. The performance of the programme and its relevance was continuously assessed. The most recent assessment performed by a Sub-committee of the Malta Ornis Committee in 2010 concluded that a fundamental material shortcoming of the programme was lack of relevance of the project itself.

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3 Page 7, Report of Ornis on the breeding programme in Malta and Gozo, 17 February 2010
Moreover, the Sub-Committee report indicated that:

“It seems that it is well-known among finch breeders… that the use of captive-bred breeding pairs invariably produces the best results; again, the limited experience at Għammieri supports this position. ‘Genetic diversity’ would become an issue only if birds were inbred over several generations - which is seldom the case since breeders regularly purchase new stock from and swap captive-bred birds between each other’s aviaries’.

“.the experience as Għammieri so far indicates that wild-caught birds are not necessary for a successful breeding programme. It therefore follows that…. the number of wild caught birds needed to sustain genetic diversity in the captive breeding project is zero, as genetic diversity can be maintained by the inclusion of either local or European captive-bred stock”.

Indeed this assessment has prompted the Ornis sub-committee to recommend “that the captive-breeding project be assigned the exclusive role of successful captive breeding, rather than carrying out experiments in genetic diversity”.

The above findings explain why the Maltese captive breeding programme has never proceeded beyond the small scale pilot phase, as the performance of the programme has shown beyond reasonable doubt that whilst finch breeding is technically possible albeit difficult and costly, the taking of finches from the wild is not necessary in the first place for the sustainability of the captive breeding programme and indeed the programme can be more feasibly sustained by importing captive-bred specimens from elsewhere in Europe as opposed to wild-caught finches. Therefore captive breeding programme cannot, in principle, be regarded as a substituted for, let alone as satisfactory solution to traditional finch capturing activity.

It should also be noted that even if the breeding of finches was 100% successful, such success does not provide a satisfactory solution to the activity of live-capturing of finches. A captive breeding programme (either centralised or decentralised) would only provide a satisfactory solution in those cases as that of Belgium, when the sole or primary scope of live-finch capturing is intended to fulfil the purposes of bird breeding in captivity as opposed to the fulfilment of practicing live-finch capturing, independently of any subsequent breeding attempts. Whilst it is true that some of the finches that are eventually released in aviaries do attempt to breed, such breeding activity may happen purely by chance rather than as a fulfilment of the scope they were caught in the first place. The reason why they are caught and kept in captivity is inextricably linked to the fulfilment of the recreational activity of live-finch capturing as a means in itself rather than a means to fulfil the objectives of another activity.

It should furthermore be noted that the Non-paper on Finch Trapping which was presented on 14 June 2002, referred to a relatively large scale de-centralised programme based on the estimated 200,000 finch population kept in captivity. According to the Non-paper, this programme would in turn permit the annual capturing of circa 20,000 finch specimens from the wild in order to maintain genetic diversity of the captive finch pool.

It should also be noted that Malta’s starting point in negotiations on finch trapping dossier, prior to the formulation of the Non-paper, was the proposal to include the seven traditionally live-captured finch species in Annex II/2 of Directive 79/409, and it was only after the Commission proposed a large-scale decentralised captive breeding programme - coupled with the possibility of taking finches from the wild to maintain genetic diversity - that Malta has (reluctantly) accepted to drop its original proposal for inclusion in Annex II/2 and adopt the solution proposed by the Commission on the basis

4 Ibid; p.8
that the request for the inclusion of seven finch species in annex II/2 of Directive 79/409 “would therefore no longer be necessary”.

The Commission and the Case Law have thus far linked live-capturing of finches to breeding in captivity (Belgium case). It seems that live-capturing of finches as an activity per se is not considered judicious use, notwithstanding the wording of Article 9(1)(c): specifies “...to permit, under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers”. However it is also clear that Malta has attempted to establish a captive breeding programme, which was tried and tested, but failed to provide satisfactory solution.

Moreover the facts and circumstances quoted in the Belgian case are indeed very specific and do not reflect the case at hand in Malta. Indeed, in the Belgian case, the Belgian authorities have not questioned whether the captive breeding programme is an alternative solution or not. In that case, the Belgian Court was not asking whether the captive breeding programme is, in principle, seen as a satisfactory alternative solution to the live capturing of finches, generally. On the contrary, Belgium had accepted this point in principle (based on the particular circumstances of that case), but was only asking whether a Member State may (after having already established a captive breeding programme and established that it is a satisfactory solution), on a decreasing basis and for a limited period, authorise the capture of birds from the wild in order to enable bird fanciers to stock their aviaries. The Court was therefore never asked to enter into the point of whether the captive breeding programme is, in all circumstances, always deemed to be a satisfactory alternative solution and therefore this case would not apply to the particular case at hand. Taking note of the particular circumstances surrounding Malta’s position, it is clear that the captive breeding programme is not a satisfactory alternative solution in Malta’s case and the Court’s reasoning in this judgment would not therefore apply.

Furthermore, in Malta’s case, any other activity which complies with the prohibitions laid down in the Directive (e.g. captive breeding) does not and cannot constitute a “solution” in relation to traditional live-capturing and that no solution exists other than permitting, under strictly supervised conditions and on a selective basis, the limited live-capturing and keeping in captivity of finches in small numbers. The success of the breeding programme turned out to be not possible due to the inherent nature of the programme not being a possible alternative to finch trapping (also seen in light of the socio and cultural context of this activity).

Subject to the satisfaction of the condition that there exists no other satisfactory solution, the other conditions for the application of a derogation under Article 9 would also need to be fulfilled. The applicable derogation in this case would refer to the derogation provided for in Article 9(1)(c) of the Birds Directive. The conditions to be fulfilled for the application of this derogation are the following: (i) judicious use; (ii) small numbers; (iii) supervised conditions; and (iv) selective basis.

**Judicious Use**

In *Ligue pour la protection des oiseaux and Others* (Case C-182/02, 16 October 2003, paragraph 11), the CJEU held as follows:

> "It is clear from the foregoing that the hunting of wild birds for recreational purposes during the periods mentioned in Article 7(4) of the Directive may constitute a judicious use authorised by Article 9(1)(c) of that directive, as do the capture and sale of wild birds even outside the hunting season with a view to keeping them for use as live decoys or to using them for recreational purposes in fairs and markets (see Case 262/85 Commission v Italy [1987] ECR 3073, paragraph 38)."

However, it is also important to note that the term ‘judicious use’ has also been interpreted restrictively by the Court, so as to categorically exclude the capture or killing of protected species
where such “does not ensure the maintenance of the population of the species concerned at a satisfactory level” (Case C-182/02 Ligue pour la protection des oiseaux and Others, paragraph 17; and Case C-60/05 WWF Italia, paragraph 32, amongst others). It is therefore considered that the retention for traditional practices as is the practice for the live capturing of finches in Malta may fall within the provisions of Article 9(1)(c) as judicious use provided that the maintenance of the population of the species is ensured at a satisfactory level and assuming of course that all the other conditions for the application of a derogation under that Article are also fulfilled.

It is furthermore noted that the reasons for applying a derogation to permit the limited live-capture of birds are also specifically reflected in the codes established in the Commission’s template for reporting on such derogations:

- code 61 (to permit, under strictly supervised conditions and on a selective basis the capture of certain birds in small numbers);
- code 62 (to permit, under strictly supervised conditions and on a selective basis the keeping of certain birds in small numbers); and
- code 63 (to permit, under strictly supervised conditions and on a selective basis other judicious use of certain birds in small numbers).

**Maintenance of the Populations at Satisfactory Level and Small Numbers**

A separate detailed technical assessment on the maintenance of the populations at satisfactory levels, as well as the calculation of small numbers using established methodology is enclosed.

In summary, all seven finch species are characterised by extremely large populations and geographical range. BirdLife International (2004) classifies the Pan-European populations of Chaffinch, Goldfinch, Greenfinch, Hawfinch, Serin and Siskin as Secure and the Linnet as having undergone a Moderate Recent Decline. BirdLife International (2004) thus classifies the Linnet as having an Unfavourable conservation status in Europe (SPEC 2).

The most recent update on the conservation status is provided by the European Bird Census Council (EBCC, 2013). According to this most recent dataset, the Chaffinch, Goldfinch, Greenfinch and Hawfinch have retained a Favourable conservation status at the Pan-European level, but the Linnet, Siskin and Serin populations have experienced a Moderate Decline (EBCC, 2013) and thus have an Unfavourable conservation status at the Pan-European Level.

Within the EU territory (EU 28), the situation is somewhat different. Based on BirdLife International (2004) definition of Stable (not more than 10% change in 10 years), the EU populations of Goldfinch, Siskin and Hawfinch increased in both the minimum and maximum number of pairs, whereas the EU populations of Greenfinch, Chaffinch and Serin remained stable. The minimum EU population of Linnet remained stable (-2.17%) but the maximum number of pairs decreased (-12.94%). On the other hand, the Linnet’s geomean population remained stable (-9.80%).

The situation with respect to the reference populations, which form a subset of the EU population based on ring recoveries in Malta for six finch species (Raine, 2007) and in Italy for Hawfinch (Spina and Volpini, 2008) also differs considerably. The minimum and maximum number of pairs of Linnet, Goldfinch and Hawfinch increased whereas the minimum and maximum number of Greenfinch, Siskin, Chaffinch and Serin pairs remained stable (not more than 10% change in 10 years).

Notwithstanding the overall stable or increasing trend of the source (reference) EU population (ring recoveries in Malta and Italy) the calculation of “small numbers” and the resultant hypothetical harvest quotas are based on only those European populations with a stable or increasing population.
This meant that in the case of Linnet, two EU Member States, namely Slovenia and Slovakia, which collectively form 3% of all ring recoveries of this species in Malta (Raine, 2007) were eliminated from the reference population. In the case of Hawfinch, Belgium was eliminated from the reference population, which forms 0.57% of all ring recoveries of this species in Italy (Spina and Volpini, 2008). In the case of the other species, including Siskin and Serin, none of the source populations have experienced a decline (are all stable or increasing) thus no countries were omitted from the respective reference populations.

In order to meet the criteria laid down in article 9(1)(c) of the Birds Directive the derogations should only relate to “small numbers” of birds. According to the Guidance Document on Sustainable Hunting under the Birds Directive, there are two approaches which may be used to determine what is considered to be “small numbers”, as follows: (i) the figure must be much lower than the bag statistics of the species, a figure in the order of 1% usually meets this condition, or alternatively (ii) the figure is in the order of 1% of the total mortality of the population concerned with the derogation.

Furthermore, paragraph 3.5.42 of the same Guidance Document also makes the following reference: “For abundant species with a favourable conservation status, taking in excess of the 1% threshold (up to 5% of annual mortality) may be considered following an in-depth scientific analysis by the competent authority which authorises the derogation. This would be in order to verify that the derogation is not incompatible with the objectives of the Directive”. An additional reference is provided in paragraph 3.5.34 of the Guidance Document, which specifies that:

“In order to determine an exact figure for the threshold [bag limit], two approaches are possible:

- the figure must be much lower, by at least an order of size, than those figures characteristic of the taking of birds under Article 7. A figure of 1% meets this condition.
- the taking must have a negligible effect on the population dynamics of the species concerned. A figure of 1% or less meets this condition as the parameters of population dynamics are seldom known to within less than one percentage point and bird taking amounting to less than 1% can be ignored from a mathematical point of view in model studies.”

Reference is also made to the European Commission paper entitled ‘Second report on the application of Directive 79/409/EEC on the conservation of wild birds’ (COM (93) 572 final) of November 1993. In this paper, according to the EU ORNIS Committee, “small numbers” should be understood to mean any sample of less than 1% of the total annual mortality rate of the population in question (average value) for those species which are not to be hunted and a sample in the order of 1% for those species which may be hunted.

The document, however, argues that although hunting bags are generally proportionate to the population size, the hunting pressures do not necessarily provide an appropriate approach, since this focus is on the hunting rather than the population size. Furthermore, the implication that the greater the hunting bagged the greater the number of birds which could be taken under the derogation, would not be considered to be a good conservation practice.

According to the EC Guidelines, for partial migrant species such as the seven species of finches (Hume, 2002), the population concerned means “the population of the region from which the largest numbers of migratory birds come before passing through the region where the derogation is sought to be applied during the period”.

5 http://ec.europa.eu/environment/nature/conservation/wildbirds/action_plans/guidance_en.htm
It should furthermore be noted that the relevant literature provides bird population estimates at a minimum and maximum range. However, for the purpose of calculating “small numbers” in the case of this proposal, only the minimum breeding populations and recruitment rate (chicks per pair) is being considered in the calculation of the 1% mortality of each of the seven finch species. This is in line with the Precautionary Principle. Similarly, the workings in this analysis are also based on the lowest threshold for each respective finch population estimate (minimum breeding pairs) and recruitment rate.

For each of the seven finch species considered in this analysis, the “small numbers” calculation falls considerably below the 1% threshold referred to in paragraph 3.5.34 of the Guidance Document on Sustainable Hunting. The recommended potential national bag limits are considerably lower than 1% of the total annual mortality of each respective finch species as they also take into account the average bag limits over a seven-year period (2002–2008), which in turn are all considerably below the 1% threshold, and lower than those proposed by FKNK.

**Strictly Supervised Conditions**

The Commission’s Guidance document on Sustainable Hunting under the Birds Directive states that the principle of strictly supervised conditions implies that the derogation must involve clear authorizations and shall be related to particular individuals, places, times and quantities. It also implies the need for a strong element of enforcement of such derogations to ensure compliance.

This condition is further supplemented by the strict conditions stipulated by Article 9(2) of the Birds Directive, namely that:

“2. The derogations must specify:
- the species which are subject to the derogations,
- the means, arrangements or methods authorized for capture or killing,
- the conditions of risk and the circumstances of time and place under which such derogations may be granted,
- 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,
- the controls which will be carried out.”

The European Commission also requires that the implementation of derogation is factually supervised so as to minimise the possibility of abuse. The application of such conditions in practice is already well established in Malta, with regards to live-capturing derogation of Golden Plover and Song Thrush as well as for spring hunting for Turtle Dove and Quail. The conditions amongst other include:

- Special licensing requirement
- Seasonal (national) bag limits and individual bag limits per licence
- Ringing requirement for birds used as live decoys in the case of autumn live-capturing derogation for Song Thrush and Golden Plover
- SMS and *Carnet de Chasse* reporting requirement
- Minimum enforcement standard stipulating number of police officers per field per total amount of licensed live-captors
- Other restrictions pertaining to time, place and conditions of risk (e.g. release of birds that have a scientific ring, release of accidental by-catch).

Detailed reports summarising enforcement efforts undertaken during past spring hunting and live capturing seasons are available for download from WBRU website under the following link: [http://msdec.gov.mt/en/Pages/WBRU/Reports-and-Statistics.aspx](http://msdec.gov.mt/en/Pages/WBRU/Reports-and-Statistics.aspx). These reports analyze parameters such as levels of enforcement deployment in the field, intensity of inspections, statistics pertaining to
disclosed offences, a record of prosecutions and conviction for bird-related crime, as well as an analysis of the legal measures and deterrents in place.

The practice of implementing 2012 and 2013 derogations for live-capturing of Golden Plover and Song Thrush has shown that the minimum legal requirements for strict supervision have been exceeded. Regulation 7 (3) and 7 (4) of the Conservation of Wild Birds (Framework for Allowing a Derogation Opening an Autumn Live-Capturing Season for Song Thrush and Golden Plover) Regulations, 2012, establish that for every one thousand (1,000) licenses issued, there shall be a minimum of seven (7) officers and/or marshals on duty during all hours for which an Autumn live-capturing season is open. In addition, the Police, assisted by marshals as may be necessary, are required to continue carrying out spot checks until at least two weeks following the end of an Autumn live-capturing season. During this period, for every one thousand (1,000) Autumn live-capturing licenses issued, a minimum of three (3) police officers and/or marshals shall be on duty during the hours of daylight.

For the 2012 autumn live-capturing season (Golden Plover and Song Thrush), 1,159 licenses were issued. Between 20 October 2012 and 10 January 2013, the Malta Police Force dedicated at total of 39 officers in Malta and 4 in Gozo. The number of officers on the beat at any one time ranged from 8 officers to 16 who were deployed on a daily basis during the season from 05:00hrs till 21:30hrs. During this period 2,051 inspections were carried out in Malta and 549 inspections were conducted in Gozo. After the end of the 2012 season inspections continued to be carried out during the same times throughout the year.

For the 2013 autumn live-capturing season (Golden Plover and Song Thrush), 1,164 licenses were issued. The Police maintained an average daily field deployment that ranged between a maximum of 17 officers and a minimum of 9 officers in the field at any point in time from 05:00hrs to 21:30hrs. Enforcement officers had 10 police vehicles at their disposal in addition to vehicles used by mobile squads and district police units. A total of 2,686 inspections were carried out (2,244 in Malta and 442 in Gozo). Further inspections were also carried out after the closure of the 2013 autumn live-capturing season. For live-capturing of finches, these requirements may be boosted even further. It should also be noted that Legal Notice 341 of 2013, which amends the Principal Regulations (Subsidiary Legislation 504.71) has resulted in the doubling of penalties for illegal live-capturing, amongst other offences, and the introduction of automatic fines for minor infringements, including late submission of Carnet de Chasse booklets. The following subsection outlines these legislative changes.

**Legislative changes: harsher penalties and administrative fines**

Part II of the Conservation of Wild Birds Regulations (SL 504.71) provides for offences and penalties for those who fail to comply with any provisions of these regulations or with any order lawfully given in terms of the provisions of these regulations or who contravenes any restriction, prohibition or requirement by or under these regulations, or who conspires or attempts, or aids, abets, counsels or procures any other person to contravene the provisions of these regulations or to fail to comply with any such provisions (including any order lawfully given in terms of the provisions of these regulations) or to contravene any restriction, prohibition or requirement imposed by or under these regulations.

These Regulations were amended on 25 October 2013 via Legal Notice 341/2013. The amendments have, inter alia:

- substantially increased the penalties for all types of offences;
- included a number of minor offences that will be subject to administrative fines; and
- introduced a probationary system and possibility of mandatory community service as part of the range of applicable punishments.
Below table lists the type of penalties and the amount by which they have been increased.

**Legislative changes that came into force on 25 October 2013**

<table>
<thead>
<tr>
<th>Offences</th>
<th>Previous min penalty</th>
<th>Previous max penalty</th>
<th>New min penalty</th>
<th>New max penalty</th>
<th>% increase min</th>
<th>% increase max</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st conviction under 27 (2): fine</td>
<td>239.94</td>
<td>4,658.75</td>
<td>500</td>
<td>5,000</td>
<td>108</td>
<td>7</td>
</tr>
<tr>
<td>1st conviction under 27 (2): suspension of license</td>
<td>1 year</td>
<td>2 years</td>
<td>2 years</td>
<td>5 years</td>
<td>100</td>
<td>150</td>
</tr>
<tr>
<td>Subsequent conviction under 27 (2): fine</td>
<td>465.87</td>
<td>9,317.49</td>
<td>1,000</td>
<td>10,000</td>
<td>115</td>
<td>7</td>
</tr>
<tr>
<td>Subsequent conviction under 27 (2): imprisonment</td>
<td>2 months</td>
<td>2 years</td>
<td>6 months</td>
<td>2 years</td>
<td>200</td>
<td>0</td>
</tr>
<tr>
<td>1st offence under 27 (3): fine</td>
<td>239.94</td>
<td>2,329.37</td>
<td>500</td>
<td>2,500</td>
<td>108</td>
<td>7</td>
</tr>
<tr>
<td>Subsequent conviction under 27 (3): fine</td>
<td>465.87</td>
<td>4,658.75</td>
<td>1,000</td>
<td>5,000</td>
<td>115</td>
<td>7</td>
</tr>
<tr>
<td>Subsequent conviction under 27 (3): suspension of license</td>
<td>1 year</td>
<td>3 years</td>
<td>2 years</td>
<td>5 years</td>
<td>100</td>
<td>67</td>
</tr>
<tr>
<td>Offences without license (2nd proviso to 27(3)): fine</td>
<td>6,988.12</td>
<td>13,976.24</td>
<td>7,000</td>
<td>15,000</td>
<td>0.2</td>
<td>7</td>
</tr>
</tbody>
</table>

A new Schedule VIII has also been added to the Conservation of Wild Birds Regulations, listing minor offences that shall be subject to administrative (on-the-spot) fines, provided that such offences are not committed in the presence of any aggravating factors or accompanied by other offences in which case the offenders will be charged before the Court of Magistrates and upon conviction will be liable to penalties stipulated under regulation 27 (2) and (3). Offenders served with an administrative fine will have recourse to appeal before Administrative Review Tribunal. The new amendments also presume that unless any outstanding fines have been paid, the licence will not be renewed. These minor offences are summarised in the table below.

**Administrative fines**

<table>
<thead>
<tr>
<th>Offence</th>
<th>Administrative fine (€)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use of any electric or electronic devices, bird callers</td>
<td>250 + confiscation</td>
</tr>
<tr>
<td>Use of any kind of portable cage trap smaller than 60cm X 60cm X 60 cm</td>
<td>250 + confiscation</td>
</tr>
<tr>
<td>Failure to return completed license to WBRU within 10 days from the closure of the autumn season</td>
<td>50 + 20 for every week of late return up to maximum of 300</td>
</tr>
<tr>
<td>Failure to declare every bird hunted or taken</td>
<td>50 per undeclared bird up to max 250; wherever more than 5 birds are not declared – prosecution before court</td>
</tr>
</tbody>
</table>
Crucially, the amendments also strengthen the legal deterrent against potential under-reporting of harvested birds. According to the legal amendment, a live-capturer who does not faithfully fill in the Carnet de Chasse or who has not reported his bag via SMS during the period of a derogation, would be liable to an automatic fine of €50 per undeclared bird, up to a maximum of €250. Should the number of undeclared birds exceed 5, the offender will be prosecuted before the Court of Magistrates and will be subject to increased penalties, including a fine of between €500 and €2,500 (on first conviction), and up to €5,000 on subsequent convictions, as well as confiscation, suspension of license for up to 5 years and even imprisonment of up to 2 years. Note that the above also applies to hunters.

In March 2013, the Principal Regulations (SL 504.716) were amended further to introduce even harsher penalties for infringements related to non-huntable species listed in Schedules I and IX of the Conservation of Wild Birds Regulations (LN 110/20147). The amendments increased the fines tenfold to €5,000 and/or one-year jail term for first time conviction and permanent revocation of any licence or permit. On a second or subsequent conviction the fine increased to €10,000 and/or two-year imprisonment. With these amendments, the Court shall now also order the permanent revocation of any permit or licence if this was not permanently revoked prior to entry into force of the amended regulations when the person was convicted of an offence involving hunting or taking, or attempting to hunt or take non-huntable birds listed in Schedules I or IX.

Field enforcement measures

The Administrative Law Enforcement (ALE), in conjunction with officers from other sections in the Police Force, are directed to concentrate on enforcing the law during a hunting/live-capturing season, as well as to prevent any illegal activities during the closed season, thus giving importance to preventive measures. Typically ALE engages between 22 and 28 officers on full-time enforcement duties during the season.

ALE is supported by around four fully equipped Police vehicles which carry out patrols all over the Islands, with concentrations in the main hunting/live-capturing areas. ALE is also normally beefed-up by around 25 beat officers from the various police stations around Malta and Gozo, thus doubling the effectiveness of the Police Force dedicated full-time to such activities. The officers are deployed in full uniform and in marked vehicles so as to make them easily recognizable, giving importance to the preventive aspect of the enforcement measures. In addition, officers and vehicles are provided with all means of modern communication to allow for quick transmission of information between officers, the

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Police Head Quarters and patrols on land and at sea. The minimum typical resources of ALE during hunting/live-capturing season would normally comprise the following:

- Off-road vehicles 4
- Seacraft 2
- Inspectors 1
- Sergeants 4
- Constables 17

As already stated, these are augmented, as need be, by police officers from the district stations and other officers. Below lists a number of trapping-related offences disclosed between 1st September 2013 and 31st January 2014.

<table>
<thead>
<tr>
<th>Trapping-related offences disclosed between 01/09/2013 and 31/01/2014</th>
<th>Cases in Malta</th>
<th>Cases in Gozo</th>
<th>Total number of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trapping for protected birds (eg. Finches)</td>
<td>23</td>
<td>6</td>
<td>29</td>
</tr>
<tr>
<td>Use of illegal means (eg. Artificial light; vertical nets;</td>
<td>15</td>
<td>6</td>
<td>21</td>
</tr>
<tr>
<td>bird callers etc.) trapping using nets of mesh size &lt; 30mm X 30mm</td>
<td>8</td>
<td>4</td>
<td>12</td>
</tr>
<tr>
<td>Trapping without licence</td>
<td>15</td>
<td>6</td>
<td>21</td>
</tr>
<tr>
<td>Use of unmarked live decoys</td>
<td>2</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td>Total number of disclosed trapping-related offences</td>
<td>63</td>
<td>22</td>
<td>85</td>
</tr>
</tbody>
</table>

Source: Administrative Law Enforcement

On the basis of the above statistics, it is evident that the increased frequency of police inspections and enforcement scrutiny during the period of the application of the autumn live-capturing season derogation in 2012/2013 has led to the increased detection of illegal activities, and it is envisaged that this will serve as an effective deterrent against future illegal activities. It should also be noted that despite the risk of apprehension, the drive for illegal live-capturing of finches remains strong, as evidenced by the number of charges related to finch capturing since 2009.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>172</td>
</tr>
<tr>
<td>2010</td>
<td>229</td>
</tr>
<tr>
<td>2011</td>
<td>86</td>
</tr>
<tr>
<td>2012</td>
<td>275</td>
</tr>
<tr>
<td>2013</td>
<td>85</td>
</tr>
</tbody>
</table>

Source: Administrative Law Enforcement

The average penalty meted out by the Courts for convictions related to illegal finch trapping stood at around €500 fine in the case of first time conviction, which fine was usually accompanied by confiscation of corpus delicti and suspension of license. In more severe cases, fines of over €1,000 and even imprisonment of up to 3 months were not unusual. It is clear that despite effective deployment of enforcement personnel, and despite the considerable legal deterrent, illegal finch trapping continued throughout the years during which it was banned. Indeed, as shown in table below, illegal finch trapping constituted over half of all hunting and trapping-related offences prosecuted since 2009.
The above information is significant, as it shows that not only the practice of live-capturing of finches is so deeply entrenched that it cannot effectively be eradicated despite increased enforcement and legal deterrent, but also because finch-related offences potentially detract half of the total enforcement effort (and associated material and financial resources) which could have otherwise been dedicated on other, potentially more severe cases, such as illegal targeting of Schedule I and IX species. Although this should not in any way be perceived as justifying any application of a derogation, the potential application of a controlled derogation to permit the limited live-capturing of finches may have a beneficial effect on enforcement in other areas.

It should furthermore be noted that the hunting organizations/associations in Malta have their own disciplinary regulations which promote programmes to prevent accidents to themselves and others and generally promote self-regulation and discipline. The organizations also actively promote responsible behaviour while members are hunting/live-capturing. One of the more important provisions in these self-discipline regulations is that if a member is found guilty by courts of law of having acted illegally or of criminal or unruly behaviour while hunting/live-capturing, membership is immediately suspended (or terminated in very serious cases). In the case of termination of membership, the members are thus deprived of all privileges, including the important right of seeking possible renewal of the yearly hunting/live-capturing licence in the future.

The Wildlife Crime Investigations Unit and the Special Enforcement Branch

The Government is conducting a comprehensive analysis of the present situation with regard to enforcement of wildlife crime and has also analysed the experiences of EU Member States, particularly the UK and Italy. On the basis of this assessment, a proposal for the establishment of a dedicated Wildlife Crime Investigation Unit (WCIU) within the Malta Police Force has been developed and is presently undergoing inter-ministerial consultation. The scope of the proposed WCIU is to deal effectively with all aspects of wildlife crime and is expected to be fully functional by 2015. The proposal envisages that field duties shall continue to be carried out by the ALE, which will become the WCIU, focusing exclusively on wildlife law enforcement issues. The current ALE staff complement is to be retained; however, officers should receive more specialised training on wildlife conservation issues and shall be fully dedicated for the enforcement of wildlife protection legislation. Special attention should also be paid to the need to strengthen information management, including compilation of wildlife crime statistics, monitoring of the rates of recidivism and similar information. Specialised technical and scientific assistance to the WCIU with respect to wild birds will be provided by the Special Enforcement Branch (SEB) within the Wild Birds Regulation Unit.

The reason for this structural independence from the Police Force with respect to expert scientific and technical assistance is aimed to make scientific evidence presented in Court more credible and unbiased since it is coming from a function that is structurally independent from the prosecuting body. Such procedure is analogous to the procedure adopted by other agencies dealing with criminal prosecutions when conducting comparative and identification tests and presenting the results in Court as evidence.
Other relevant restrictions

Regulations currently in force in Malta stipulate that the nets used for capturing should be of the traditional type and operated solely by human intervention without the use of electric, electronic or mechanical means. This requirement ensures that the activity is highly selective since they are operated solely by human intervention. Moreover, as stated from the case Commission vs. France (ECJ, 27th April 1988[Case 252/85]) “...those measures are justified under the Birds Directive because such capture is subject to strict territorial, temporal and personal controls in order to guarantee the selective nature of the capture”. Also by law each net shall have a surface area of not more than 37.81m² (Subsidiary Legislation 504.718[1]). The Conservation of Wild Birds Regulations provide for the following additional measures:

- Regulation 7(1) (a) to (c) prohibits the use during hunting or the taking of birds of methods that include: snares, limes including birdlime, poisonous or stupefying bait, hooks or any similar substances or methods, any electrocuting devices, any artificial light sources, mirrors, devices for illuminating targets, or any sighting devices for night shooting comprising an electronic image intensifier, or image converter; any gas or any electronic device, especially the use of pre-recorded bird callers. Nets, including those known as ‘ranja’, mist nets and any type of vertical nets; any kind of cage-traps, whether with net or not, decoy birds which are blind or mutilated; decoy live birds held by any means except those held by cotton string and swivel, explosives.
- Regulation 12 provides that “no person shall hunt or attempt to hunt, take or attempt to take by any means any birds as permitted in accordance with the provisions of these regulations, unless that person is in possession of a valid licence as applicable, issued by the Wild Birds Regulation Unit and such a person satisfies the conditions specified in the licence and in any other law”.
- Regulation 16 prohibits a person from hunting or taking birds unless he is carrying on him a recognised means of identification and the proper licence for the activity for which the licence has been issued.
- Regulation 24 prohibits hunting or live-capturing within the boundaries of bird sanctuaries as listed in Schedule V of the Regulations.

As specified above, no person may hunt or take birds in Malta without a valid licence issued by the Maltese authorities. The licence is renewable on a yearly basis and the holder must be a member of a recognised local hunting/live-capturing organization in order to obtain such renewal. This has the implication that each live-captor must abide by further conditions which the hunting organization concerned might impose to further complement the hunting regulations.

Notwithstanding that the Commission has in fact gone on record stating that it is satisfied with the legal framework enacted by Malta with respect to these conditions in respect of spring hunting and autumn trapping derogations, in the case of the potential finch live-capturing and keeping derogation, additional conditions may need to be applied, including:

- Ringing requirement for the birds caught (single-use ring)
- The requirement to participate in a mandatory scientific finch census in addition to SMS and Carnet de Chasse reporting
- Requirement for all new special licensees to sit for an examination
- Capping of the number of finch live-capturers
- Clear legal definition of eligible live-capturing sites; additional restrictions pertaining to physical location of the sites (exclusion of sites located within Annex I habitat types), configuration and size of active clap net areas
- Capping of the number of registered live-capturing sites, which should be restricted to sites identifiable on the 2008 or 2012 aerial photo maps
Selective Basis

Article 8 of the Birds Directive specifies that “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)\(^8\).” It has been asserted, on several occasions, most notably through Malta’s reply to Commission’s Reasoned Opinion concerning autumn trapping infringement case in 2012, that live-capturing as practiced in Malta is, by its very nature, selective, because:

1. Clap-nets are manually-operated;
2. Live-capturing is species-specific; and
3. Any by-catch is immediately released back into the wild since it is caught alive.

Apart from the selectivity of the live-capturing activity itself, there are two fundamental components that affect both the quantity and behaviour of birds that migrate over the Maltese Islands. Quantity is influenced by Malta’s geographical location which lies along the easternmost fringes of the Central European–African Flyway. Birds that migrate along the principal central flyway (the Siculo–Tunisian) are by far more numerous than those that migrate over the Maltese Islands (Newton, 2008). The behaviour of migratory birds is in turn affected by two main variables:

1. Weather conditions, both locally and further north in Sicily and Italy; and
2. Wind direction and speed.

Finches tend to fly at high altitudes in calm weather. Conversely, prior to inclement weather, these birds generally fly at lower altitudes yet at much higher speeds\(^9\). In both cases, they tend to migrate over or alongside the Islands without stopping, thus completely ignoring the live-capturing sites. Furthermore, the majority of the live-capturing sites are species-specific—capable of attracting only a subset from the seven finch species. This is attributed to the specific ecological requirements of the species. For example, the Linnet prefers open landscapes with limited tree cover as opposed to the Hawfinch and Siskin. Consequently, a live-capturing site located in a wooded area is inappropriate for the live-capturing of Linnets.

The methods used for live-capturing in Malta are neither large-scale nor non-selective. Furthermore, notwithstanding that the amount of birds migrating over the Maltese Islands is itself restricted to a small subset from the total European population, limiting live-capturing season from October to December essentially means that the proposed season will not coincide with or affect any wintering or resident finches or any pre-nuptial finch activity, locally. Therefore, it can also be concluded that live-capturing of finches in Malta, which depends entirely on stochastic migration, will not cause the local disappearance of any of these seven species. In order to limit the extent of live-capturing even further, only trapping sites that are visible on the aerial photographs of 2012 will be considered eligible and no live-capturing activity will be permitted within Annex 1 habitat types as listed in the Habitats Directive.

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\(^8\) Article IV(a) lists the following large-scale and non-selective methods: snares, artificial light sources, mirrors, devices for illuminating targets, sighting devices for night shooting comprising an electronic image magnifier or image converter, explosives, nets, traps, poisoned or anaesthetic bait and semi-automatic or automatic weapons with a magazine capable of holding more than two rounds of ammunition.

\(^9\) A Maltese term that best describes this behaviour is ‘\textit{horox}’.
Conclusion

Analysis of the legal context underpinned by Malta’s obligations under the Act of Accession clearly indicates that the applicable law governing potential application of derogations to permit live-capturing of finches after the termination of the transitional period granted under the Act is the Birds Directive itself. Obligations under the Act of Accession, and in particular, the requirement to establish a captive breeding programme would still be relevant insofar as the burden of proof that there exists no other satisfactory solution, as required by Article 9 (1) (c) of the said Directive, is concerned. The assessment furthermore reveals that the fulfilment of the parameters of Article 9 (1) (c) pertaining to no other satisfactory solution, judicious use, small numbers, selectivity and strict supervision are both legally and technically possible.