

Case C-900/19**Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice****Date lodged:**

6 December 2019

Referring court:

Conseil d'État (France)

Date of the decision to refer:

29 November 2019

Applicants:

Association One Voice

Ligue pour la protection des oiseaux

Defendant:

Ministre de la Transition écologique et solidaire

Intervener:

Fédération nationale de la chasse

1. Subject matter and particulars of the dispute

- 1 The French legislation authorises, in five departments in the South East, the use of limes to capture thrushes and blackbirds intended for use as decoys, on conditions set out in a decree which provides, in particular, that the number of birds captured is to be limited each year by ministerial decree.
- 2 Two animal protection associations condemn the use of limes, which in their view are cruel capture devices, and the taking of bird species which developments in scientific knowledge show to be experiencing a significant decline in populations and also to be sensitive to suffering.
- 3 Those associations have brought actions before the Conseil d'État (Council of State) against the legislation authorising the use of limes.

- 4 The Fédération nationale des chasseurs (National Federation of Hunters) has intervened voluntarily and claims that the actions should be dismissed.
- 5 Examining, in particular, the pleas alleging infringement of the provisions and the objectives of the directive on the conservation of wild birds, the Conseil d'État (Council of State) stays the proceedings and refers two questions for interpretation to the Court of Justice.

2. Legal framework

European Union law

The Treaty on European Union (TEU)

- 6 Article 3 provides:

‘1. ...

3. The Union shall establish an internal market. It shall work for the sustainable development of Europe based on ... a high level of protection and improvement of the quality of the environment. ...’

The Charter of Fundamental Rights of the European Union (the Charter)

- 7 Article 37 provides:

‘Environmental protection

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.’

Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (‘the “birds” directive’)

- 8 Article 2 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.’

- 9 Article 8 provides:

‘1. 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).’

10 Article 9 provides, in the passages of interest in the present case:

‘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. ...’

11 Annex IV reads as follows in the provision of interest in the present case:

‘ANNEX IV

(a)

– Snares (...), limes, hooks, live birds which are blind or mutilated used as decoys, ...’

French legislation

The Environmental Code

12 Book II (Hunting) includes Article L424-4, which provides, in the passages of interest in the present case:

‘...

In order to permit the strictly controlled selective hunting of small quantities of migratory birds, the Minister responsible for hunting shall authorise, on 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. ...’

The Decree 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

13 Article 1 provides:

‘The use of limes to catch 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’.

14 Article 4 provides:

‘Limes may remain in place only when a hunter is present. Every bird taken shall be cleaned immediately. The carrying of a rifle during those operations is prohibited.’.

15 Article 6 provides:

‘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’.

16 Article 11 provides:

‘Any game other than thrushes (...) and blackbirds caught accidentally shall be cleaned and released immediately’.

The Ministerial Decrees of 24 September 2018 relating to the 2018-2019 season

17 The five decrees provide in Article 1, respectively:

In the departments of [Alpes-de-Haute-Provence], [Alpes-Maritimes], [Bouches-du-Rhône], [Var] and [Vaucluse], the maximum number of thrushes or blackbirds intended for use as decoys that may be caught using limes is fixed at [2 900], [400], [11 400], [12 200] and [15 600] respectively for the 2018-2019 season.

3. Positions of the parties

The applicants

18 The applicant associations maintain that the French legislation infringes Article 9(1) of the ‘birds’ directive, notably in that it authorises a non-selective traditional hunting method. The Ligue pour la protection des oiseaux (League for the Protection of Birds) requests in that respect that an expert be appointed to determine the proportion of birds other than those authorised for capture by the use of limes that have been accidentally captured in limes during the last hunting seasons. Furthermore, the legislation does not justify the alleged absence of a satisfactory solution other than the capture with the use of limes which it authorises.

- 19 They observe, first of all, that Article 8 of the ‘birds’ directive prohibits large-scale or non-selective methods of capture and in particular limes. However, Article 9 of the ‘birds’ directive authorises Member States to derogate from that prohibition ‘where there is no other satisfactory solution’ for a number of reasons, and in particular, in the words of sub-paragraph (c), to permit, on a selective basis, the capture of certain birds in small quantities.
- 20 They further observe that the Court of Justice has stated that, ‘in order to permit the competent authorities to resort to the derogations laid down in Article 9 of Directive 2009/147 only in a manner which complies with EU law, the national legislative and regulatory framework must be designed in such a way that the application of the derogating provisions set out there is consonant with the principle of legal certainty. Accordingly, the applicable national legislation must specify the criteria for the derogation clearly and precisely and require the authorities responsible for their application to take them into account. 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 and the case-law cited).
- 21 However the French authorities allow birds to be taken with the use of limes in conditions which are not strictly controlled, even though that that method of capture is not selective, without having ascertained whether there was any other satisfactory solution and without having shown that the numbers permitted to be taken constituted small quantities.
- 22 Furthermore, the objective of protecting or maintaining the use of traditional means, equipment or methods of capture or killing of birds for purely recreational purposes cannot in itself justify the alleged non-existence of another satisfactory solution within the meaning of Article 9 that would permit a derogation from the general prohibition of certain methods of hunting laid down in Article 8.

The defendant and the intervener

- 23 The Ministre de la Transition écologique et solidaire (Minister for the Ecological and Inclusive Transition) and the Fédération nationale des chasseurs (National Hunting Federation) contend that the action should be dismissed as unfounded.

4. Assessment of the Conseil d'État (Council of State)

The selective nature of the hunting process authorised by the derogation

- 24 It follows from Article L424-4 of the Environmental Code in conjunction with Articles 1, 4 and 11 of the decree of 17 August 1989 that, in order to ensure the selective nature of the traditional method of capture consisting in the use of limes in the five departments concerned, hunters authorised to use limes must be permanently close to their devices, notably in order to identify the species present at the site, to ensure that species other than thrushes and blackbirds do not go near the devices and, where appropriate, to be in a position to clean and release immediately birds of other species which, in spite of those precautions, have accidentally been captured, as the use of limes is in principle a non-lethal mode of capture.
- 25 In an action for failure to fulfil obligations concerning the French legislation then in force, which was broadly comparable with the current legislation, the Court of Justice held in the judgment of 27 April 1988, *Commission v France* (252/85, EU:C:1988:202, paragraphs 29 and 30) that ‘it should be pointed out that the French rules concerning the capture of thrushes and skylarks in certain departments are very precise. The abovementioned decrees make the grant of authorisations to capture such birds subject to a considerable number of restrictive conditions. Furthermore, it should be noted that the Commission has not shown that the French rules permit the capture of birds in a manner incompatible with a judicious use of certain birds in small numbers. The Commission has not contested the defendant’s argument that the number of birds captured constitutes a very small percentage of the population concerned’.
- 26 However, with regard to Article 9 of the ‘birds’ directive, in the judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477), concerning the legislation put in place by a Member State in relation to another traditional hunting process, which was delivered after Article 3 TEU and Article 37 of the Charter had entered into force, the Court of Justice held that that legislation did not satisfy the condition relating to the selective nature of a method of capture in order to be able to derogate from Article 8 of the directive, relying on the existence of ‘by-catch’ without specifying the size of such by-catch. However, it also held that the derogation granted by the legislation at issue did not correspond to ‘small quantities’ of birds, in breach of another condition laid down in Article 9(1)(c) of the ‘birds’ directive.
- 27 The Conseil d'État (Council of State) will submit a first question for a preliminary ruling on the concept of ‘by-catch’ and on the selective nature required by the derogation provided for in Article 9(1)(c) of the ‘birds’ directive.

The unjustified absence of another satisfactory solution

- 28 In its judgment of 21 June 2018, *Commission v Malta* (C-557/15, EU:C:2018:477, paragraph 51), the Court of Justice held that Article 9 of the ‘birds’ directive prescribes a ‘clear and sufficient statement of reasons concerning the conditions of the absence of another satisfactory solution’, required by Article 9 of the ‘birds’ directive.
- 29 However, the decree of 17 August 1989 authorises the use of limes in the conditions which it determines on the ground that, having regard to the traditional nature of that method of hunting in the departments concerned, ‘there is no other satisfactory solution’ (Article 1), since the method of hunting corresponds, in the departments in which it is authorised, to a traditional method of hunting expressly referred to in Article L424-4 of the Environmental Code.
- 30 The Conseil d’État (Council of State) therefore wonders whether the preservation of a traditional recreational method of hunting may mean in itself that there is no other satisfactory solution within the meaning of Article 9(1) of the directive, thus permitting a derogation from the general prohibition of that method of hunting laid down in Article 8.

5. The questions referred for a preliminary ruling

- 31 The Conseil d’État (Council of State) submits the following two questions:

1 — Must Article 9(1)(c) of Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 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 Directive [2009/147/EC] of 30 November 2009 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 subparagraph c of that paragraph are satisfied, may justify the absence of another satisfactory solution within the meaning of Article 9(1), thus permitting a derogation from the principle laid down in Article 8 that those methods and means of hunting are prohibited?