

**A preliminary assessment of the Derogation Report from Malta  
regarding spring hunting of Common Quail *Coturnix coturnix*  
and European Turtle Dove *Streptopelia turtur***

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## **A preliminary assessment of the Derogation Report from Malta regarding spring hunting of Common Quail *Coturnix coturnix* and European Turtle Dove *Streptopelia turtur***

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### **Summary**

In November 2005, Malta applied for a derogation under Article 9 of the EC Birds Directive, which would allow the hunting in Malta of two species, Common Quail *Coturnix coturnix* and European Turtle Dove *Streptopelia turtur*, during their spring migration. This report assesses whether the application for this derogation by Malta meets the terms of the Directive. The assessment was carried out by comparing The report *Malta's Report on the Application of the Derogation for Spring Hunting under the provisions of Article 9 of Council Directive 79/409/EEC: on the Conservation of Wild Birds* (2005) with the *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"* (2004).

The derogation report does not appear to meet the terms of the Birds Directive in a number of areas:

- The populations of both *Coturnix coturnix* and *Streptopelia turtur* are decreasing; both have an Unfavourable conservation status in Europe and are classified by BirdLife International as a Species of European Conservation Concern (SPEC) in the category SPEC 3, and their populations cannot be described as "maintained at a satisfactory level".
- The demonstration in the Derogation report that there is "no other satisfactory solution" is inadequate. In particular, the possibility of hunting these two species in the autumn, when it would be legal under the Birds Directive is not addressed. The importance of traditional socio-cultural values highlighted in the Maltese derogation report is explicitly mentioned in the EC guidance as being insufficient to justify a derogation from the directive.
- The unfavourable conservation status of *Coturnix coturnix* and *Streptopelia turtur* appears to preclude their definition as "certain birds" under Article 9.1 (c). This would seem to be sufficient by itself to invalidate the application by Malta for derogation.
- The Maltese Derogation Report does not properly address the question of "judicious use". The hunting of any species during spring migration cannot be considered to be "judicious use" under Article 9.1 (c), because of reference to Article 7 (4), which explicitly forbids hunting of any species "during their period of reproduction or during their return to their rearing grounds" The issue of the permissibility of hunting birds on pre-nuptial migration and conditions that may apply is, however, the subject of a case that is at present pending a decision of the ECJ in a case between the Commission and Finland. It seems likely that Malta will still need to demonstrate that no birds of these species are available on autumn migration for this case to have any relevance.
- The unfavourable conservation status of both species means that the Commission should not grant a derogation, even for the taking of "small numbers" unless it can be clearly demonstrated that use of such a derogation is beneficial to the conservation status of the species/population concerned.
- The hunting regulations in Malta appear to be "strictly supervised" and the derogation is for birds taken "on a selective basis", as required. The Derogation report does not explain the methods of netting in sufficient detail, however, and it is not clear whether additional species are captured by this method, and if so, in what numbers. The commitment of the Maltese Government to enforce the regulations is apparent, but there is evidence that this commitment is not being realised. In particular, the recorded average hunting bag of only one bird per registered hunter for the whole of 2004 seems unlikely to reflect the true situation.
- The precise formal conditions under Article 9 (2) appear mostly to have been met, although more details of the netting method need to be given, and The questions of level of risk, and the possibility of precautions to restrict the risk for other species appear not to be covered.

## Introduction

The Birds Directive does not permit hunting during pre-nuptial migration, even for Annex II species. The Government of Malta has submitted a Derogation under Article 9.1 (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". The birds in question are Common Quail *Coturnix coturnix* and European Turtle Dove *Streptopelia turtur* on spring migration in Malta, and the "judicious use" is hunting with nets and firearms.

This assessment evaluates *inter alia* whether the hunting of Common Quail and European Turtle Dove on Malta in 2004 took place "under strictly supervised conditions" and "on a selective basis", whether it constituted "judicious use", and whether the scale of the harvest was "in small numbers". The basis for this evaluation was 1.) A report submitted in November 2005 by The Commissioner of Police, Ministry for Justice and Home Affairs, Malta, titled *Malta's Report on the Application of the Derogation for Spring Hunting under the provisions of Article 9 of Council Directive 79/409/EEC: on the Conservation of Wild Birds*, and 2.) the European Commission document, dated August 2004, titled *Guidance document on hunting under Council Directive 79/409/EEC on the conservation of wild birds "The Birds Directive"*

### **Background: Malta's position and the Conservation status of *Coturnix coturnix* and *Streptopelia turtur***

The application for this Derogation was negotiated during Malta's accession to the EU, summarised in the document *Malta's European Common Position (CONF-M 110/02)* dated September 2002, which included the following statement:

*The EU takes note of Malta's statement that it will limit the taking in spring to only two species (*Streptopelia turtur* and *Coturnix coturnix*), as an application of the derogation under Article 9 of the Directive. In this context, the EU points out that, according to the Directive, certain species may be hunted because of their high population level, geographical distribution and reproduction rate in the Community as a whole, to the extent that the limits set by the Directive are respected and the population of these species is maintained at a satisfactory level"*

Both *Coturnix coturnix* and *Streptopelia turtur* are widely distributed summer visitors to Europe with populations estimated at 3.5 – 7.2 million and 2.8 – 4.7 million, respectively, but both species have an Unfavourable conservation status (BirdLife International 2004). These population levels can safely be described as "high", although this is a relative term, and many European bird species have populations which are orders of magnitude higher. The question of whether "the limits set by the Directive are respected" are discussed below in the assessment of Malta's application for this derogation.

The question of whether "the population of these species is maintained at a satisfactory level" may also be open to interpretation, but there is no doubt that both species have experienced considerable decreases in their European populations in recent decades (Hagemeijer & Blair 1997). The European population of *Coturnix coturnix* underwent a large decline between 1970 and 1990, and in the 1990s the population was described as fluctuating, so that "the total population size probably remains below the level that preceded its decline. Consequently, it is provisionally evaluated as Depleted" (BirdLife International 2004). Although the wording is uncertain, the species is classified by BirdLife International as a Species of European Conservation Concern (SPEC) in the category SPEC 3 (Species whose global populations are not concentrated in Europe, but which have an Unfavourable conservation status in Europe).

The European population of *Streptopelia turtur* is also decreasing and "According to Jarry (1994), and Hill (1992), hunting has the worst effect on Turtle Dove populations and constitutes one of the main factors in their decline. Particularly in the spotlight is hunting during the spring migration which is still practiced in Morocco, West Greece and in France (where it is illegal) and probably in other Mediterranean countries" (Draft EU Management Plan for *Streptopelia turtur*, 2005). The current evaluation of the population trend of *Streptopelia turtur* is "Declining". (BirdLife International 2004) and it is also classified by BirdLife International as SPEC 3. The Draft EU Management Plan for *Streptopelia turtur* (2005) explicitly recommends in Table 7, which summarises activities at national level which are needed to ensure the future favourable conservation status of *Streptopelia turtur*, that countries should "ensure that national hunting seasons are in accordance with information on breeding period as defined in "Period of Reproduction and Pre-nuptial migration of Annex II Bird Species in the EU." and that they should "avoid regional derogations."

## The three conditions under which Article 9 may be used

Before a valid derogation can be given under article 9, the competent national authority needs to consider and properly address several conditions concerning the derogation's prior justification and subsequent application. The first of these is that derogations are only possible in cases where "there is no other satisfactory solution"; secondly, the derogation needs to satisfy conditions under Article 9 (and in the case being considered, 9.1(c) ); thirdly, it needs to satisfy formal conditions under Article 9.2.

### 1. Demonstrating that there is "No other satisfactory solution"

In Malta, the national regulations stipulate that Common Quail and European Turtle dove may be hunted and captured from 25 March to 22 May and from 1 September to 31 January, except on Sunday afternoons and public holidays. The Maltese Derogation Report presents one relevant argument for there being "no other satisfactory solution", namely, that the two species in question are more numerous on spring migration than on autumn migration:

*"As a result, there is no other solution for the Maltese Islands with regard to the capturing of Turtle Dove and Quail in spring as the number of these migratory species is minimal in the autumn. Agreement on this had been reached during technical meetings held between Malta and Commission officials during accession negotiations in 2002<sup>5</sup>. Commission officials also accepted the fact that that the banning of such an activity during spring would also be tantamount to the abolition of hunting in the Maltese islands."*

A second argument highlights the importance of socio-cultural values and the "continuation of old popular national customs".

A weakness in these arguments is that no information is given about the level of migration, or of hunting, in the autumn, when hunting would be legal under the Directive. The statement that the number "is minimal" is imprecise and unhelpful, as is an earlier statement that they "do not occur in significant numbers at this time". The footnote supporting the statement about agreement between Malta and the Commission (reproduced below) refers to a source which is unavailable for checking. The statement about banning of spring hunting of these two species being "tantamount to the abolition of hunting" is exaggerated, since the report from Malta also explains that it is legal to hunt 31 species on the islands. Malta also has the shortest close season for hunting in Europe and the scale of hunting on the islands in spring, autumn and winter is very well known.

The EC hunting guidance document addresses both of these arguments.

*"It is therefore clear that another solution cannot be deemed unsatisfactory merely because it would cause greater inconvenience to or compel a change in behaviour by the beneficiaries of the derogation.... That such activities may be 'ancestral' or partake of an 'historical and cultural tradition' does not suffice to justify a derogation from the directive" (P 42, paragraph 3.4.11) and*

*"the Court did not describe at length under what circumstances recreational hunting would meet the condition as to "no other satisfactory solution". However, in paragraph 16 of the judgement, the Court provides important clarification, noting that this condition "cannot be considered to have been satisfied when the hunting period under a derogation coincides, without need, with periods in which the Directive aims to provide particular protection" ... There would be no such need if the sole purpose of the derogation authorising hunting were to extend the hunting periods for certain species of birds in territories which they already frequent during the hunting periods fixed in accordance with Article 7 of the Directive " (P 43, paragraph 3.4.15) and*

*"The absence of species in particular regions during normal hunting periods due to migration patterns may also be a factor for consideration.... Such hunting would be permissible in "territories" not used by birds during the normal hunting period" (P 46, paragraph 3.4.27) and*

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<sup>5</sup> « Speaking Notes – PP22com05 »

*Any such derogation would need to be assessed on a case by case basis. For some migratory species that do not spend the winter in a Member State, there may be consistently good opportunities for a hunting season in such territories while the species is on post reproduction migration. This is an important factor in any consideration of allowing hunting seasons outside normal permissible periods. The issue of the permissibility of hunting birds on pre-nuptial migration and conditions that may apply is the subject of a case that is at present pending a decision of the ECJ [Commission/Finland case C-344/03]. (P 46 - 47, paragraph 3.4.29).*

A key consideration in deciding whether there is “no other satisfactory solution” is therefore the scale of migration and hunting of *Coturnix coturnix* and *Streptopelia turtur* on Malta in the autumn, and no detailed information on this is given in the Maltese Derogation Report.

## **2. Satisfying conditions under Article 9.1 (c)**

### **“certain birds”**

The unfavourable conservation status of *Coturnix coturnix* and *Streptopelia turtur* appears to preclude their definition as “certain birds” under Article 9.1 (c). The EC hunting guidance document explains this as follows:

*“In case C-182/02, the Court stated that the condition as to “certain birds in small numbers” “cannot be satisfied if a hunting derogation does not ensure the maintenance of the population of the species concerned at a satisfactory level.” It is therefore difficult to conceive of circumstances where an Article 9.1 (c) derogation would be justified for a species that has an unfavourable conservation status.” (P 52, paragraph 3.5.21).*

This would seem to be sufficient by itself to invalidate the application by Malta for derogation.

### **“judicious use”**

The term “judicious use” is not defined in the Directive, but it is explained as follows in the EC hunting guidance document:

*“However, any exploitative connotation carried by the term “use” needs to be balanced by the connotations of responsibility, restraint and good judgement imparted by “judicious”” (P 53, paragraph 3.5.24).*

The EC hunting guidance document also explains that recreational hunting can be considered as “judicious use” in the light of a decision by the Court in Case C-182/02, but not during the spring migration or breeding seasons. The Court stated that:

*“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”*

The statement “during the periods mentioned in Article 7 (4)” is crucial. Article 7.4 of the Directive states *inter alia* that “Member States...shall see in particular... that the species to which hunting regulations apply are not hunted during their period of reproduction or during their return to their rearing grounds” The hunting of any species during spring migration cannot therefore be considered to be “judicious use” under Article 9.1 (c), and the case of *Coturnix coturnix* and *Streptopelia turtur* in Malta is no exception.

The Maltese Derogation Report does not properly address the question of judicious use. Instead, under the heading “Judicious Use” it emphasises the socio-economic and culinary aspects of hunting activity, and stresses that the derogation is sought “not for general convenience but simply because these species appear more during the spring” and continues “Furthermore, it is impossible to quantify the number of birds involved in migration through the Maltese islands and thus it is very difficult to have appropriate statistics. Nevertheless, Malta is fully committed to ensure that the population of Turtle Doves and Quails is maintained at a satisfactory level and is making use of the data and statistics that are available to ensure that it meets its commitment.” It is not clear

from the report how this commitment is to be realised, and it is not easy to understand how hunting these two species on spring migration in Malta can ensure that their populations are maintained at a satisfactory level.

#### **“in small numbers”**

The EC hunting guidance document states that:

*“Derogations should not be granted for species or populations with an Unfavourable conservation status, which are declining within the European Union...or with very low population levels unless it can be clearly demonstrated that use of such derogations are beneficial to the conservation status of the species/population concerned”* (P 56, paragraph 3.5.39).

The list of huntable migratory species that are considered at present to have an unfavourable conservation status in the EU is given in Figure 10 of the document (P 81) and includes *Coturnix coturnix* and *Streptopelia turtur*.

The Maltese Derogation Report disregards the conservation status of the two species, and gives details of ring recoveries and population estimates in other European countries, hunting returns in Malta and estimated mortality rates. While the Unfavourable conservation status of these species means that much of the information provided by Malta is not relevant, it is worth pointing out that some of this information actually contributes to the case against the derogation. The ring recoveries for *Coturnix coturnix* came largely from Italy. Between 1 May and 22 May 2004, 2 544 Quails were registered as having been hunted in Malta. The Italian breeding population of Common Quail is estimated at 5 000 - 20 000 pairs (10 000 - 40 000 individuals) (BirdLife International 2004). The Maltese hunting bag thus represents between 6% and 25% of this population.

#### **“Strictly supervised conditions on a selective basis”**

The EC hunting guidance document states that:

*“The principle of strictly supervised conditions implies that any use of this type of derogation must involve clear authorisations that must 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”* (P 57, paragraph 3.5.43).

The Maltese Derogation Report gives details of conditions which certainly appear to be strictly supervised and selective, as required by Article 9.1 (c). These include firearm restrictions, hunting licences, protected areas, the necessity of membership of hunting associations, application to police for licences, a hunters' licence examination administered by Malta Environment and Planning Authority, and annual licence renewal supported by correctly completed Carnet de Chasse. Enforcement is by the Administrative Law Enforcement Unit and by Police Officers. In total, 475 cases of illegal hunting and trapping were brought to the courts of justice in Malta in 2004.

The principle of 'selectivity' is met by the restriction of spring hunting activity in Malta to two species. The EC hunting guidance document makes it clear that the principle

*“also implies that certain technical aspects of the method used can verifiably demonstrate selectivity”* (P 58, paragraph 3.5.45).

This issue is not addressed by the Maltese derogation report. While experienced hunters should have no difficulty identifying the two species in question, there is a need to demonstrate that the nets used to trap *Coturnix coturnix* do not affect any other species.

The number of *Streptopelia turtur* reported as shot and trapped in Malta in 2004 was 10 910, and the number of *Coturnix coturnix* was 2 544. The number of registered hunters in 2004 was 11 759 and the number of trappers 4 691, of whom 2 694 also held hunting licences. This means that according to the records, each registered hunter shot or trapped an average of about one bird in 2004. It seems probable that the true situation differs from that reported. Cramp (1985) reported that about 100 000 Turtle Doves were shot annually on Malta. There have been no reports of a 90% reduction in the hunting bag over the past 20 years, and the situation is monitored by a number of agencies, although accurate data are lacking. It is known that many hunters are not registered, and do not hold licences or complete Carnets de Chasse. The accuracy of the Carnets de Chasse

which are completed is unverified and open to question. There is a need for the Maltese authorities to bring national legislation more closely into line with the Directive, and for stronger enforcement of existing regulations. The Maltese derogation report strongly recognises this need and ends with the statement:

*“Malta is committed to carry on with its work towards the continuous strengthening of the enforcement policy on hunting and trapping activities in order to ensure the proper implementation of the regulations”*

It does not seem to realise, however, that these regulations still fall far short of the requirements of the Birds Directive.

### **3. Satisfying precise formal conditions under Article 9. (2)**

The formal conditions listed in the EC hunting guidance document, and the compliance of the Maltese Derogation Report with each formal condition is assessed below:

#### **“The species which are the subject of the derogations”**

It is clear in the report that the species involved are *Coturnix coturnix* and *Streptopelia turtur*.

#### **“The means, arrangements or methods authorised for capture or killing”**

It is clear in the report that the methods used are shooting with firearms and trapping with nets. The specifications of permitted firearms are given. Details of the netting method, and in particular their selectivity (whether they also trap other species, and if so which ones and in what numbers) are not given.

#### **“The conditions of risk and the circumstances of time and place under which such derogations may be granted”**

The timing and location of activities in the derogation are clear in the report. The questions of level of risk, and the possibility of precautions to restrict the risk for other species appear not to be covered.

#### **“The authority empowered to declare that the required conditions obtain and to decide what means, arrangements or methods may be used, within the limits, and by whom.”**

The Ministry for Justice and Home Affairs, which is also responsible for the police on Malta submitted the derogation and appears to be the principal authority under this condition. The Maltese Derogation Report mentions that the Administrative Law Enforcement Unit also enforces these regulations, and that the Malta Environment and Planning Authority is responsible for examining hunters before they are issued with licences.

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